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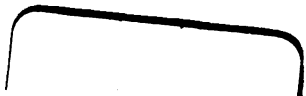
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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Alabama,

DURING THE

NOVEMBER TERM, 1905-1906.

-BY-

o
LAWRENCE H. LEE,

SUPREME COURT REPORTER.

VOL, CXLVII.

MONTGOMERY, ALA.
BROWN PRINTING CO., PRINTERS AND BINDERS.
1907.

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DURING THE TIME OF THESE DECISIONS.

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LEON C. McCORD, SECRETARY, Guntersville.

*Died February 10th, 1906.

§Appointed February 18th, 1906.

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2d Circuit.....	HON. J. C. RICHARDSON.....	Greenville.
3d Circuit.....	HON. A. A. EVANS.....	Clayton.
4th Circuit.....	HON. B. M. MILLER.....	Camden.
5th Circuit.....	HON. S. L. BREWER.....	Tuskegee.
6th Circuit.....	HON. SAMUEL H. SPROTT.....	Livingston.
7th Circuit.....	HON. JOHN PELHAM.....	Anniston.
8th Circuit.....	HON. D. W. SPEAKE.....	Decatur.
9th Circuit.....	HON. W. W. HARALSON.....	Fort Payne.
10th Circuit.....	HON. A. A. COLEMAN.....	Birmingham.
11th Circuit.....	{ HON. E. B. ALMON.....	Tuscumbia.
	{ *HON. JOS. H. NATHAN.....	Sheffield.
12th Circuit.....	HON. H. A. PEARCE.....	Dothan.
13th Circuit.....	HON. SAMUEL B. BROWNE.....	Mobile.

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Northeastern Chancery Division...	HON. W. W. WHITESIDE,	Anniston.
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Appointed on resignation of Judge Almon.	

§Appointed on death of Chancellor Altman.

**JUDGES OF INFERIOR COURTS OF LAW AND EQUITY
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Birmingham City Court..	{ HON. CHAS. A. SENN.....	Birmingham.
	{ HON. CHAS. W. FERGUSON..	Birmingham.
Gadsden City Court.....	HON. JOHN H. DISQUE.....	Gadsden.
Mobile City Court.....	HON. O. J. SEMMES.....	Mobile.
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	{ HON. WILLIAM H. THOMAS..	Montgomery.
Selma City Court.....	HON. J. W. MABRY.....	Selma.
Talladega City Court....	HON. G. K. MILLER.....	Talladega.
Tuscaloosa County Court	HON. H. B. FOSTER.....	Tuscaloosa.
Criminal Court of	{ HON. DANIEL A. GREENE....	Birmingham.
Jefferson County.....	{ HON. S. L. WEAVER.....	Birmingham.
Walker County Law and	{ HON. PEYTON NORVELLE....	Jasper.
Equity Court.....	{ *HON. T. L. SOWELL.....	Jasper.

*Appointed on resignation of Judge Norvelle.

ERRATA.

For Stewart v. The State, p. 137, read Cowart v. The State.

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CASES

IN THE

SUPREME COURT OF ALABAMA.

NOVEMBER TERM, 1906-1907.

Grisham v. The State.

Assault with Intent to Murder.

(Decided June 30th, 1906. 41 So. Rep. 997.)

1. *Criminal Law; Appeal; Instructions; Exceptions in Gross.*—An exception to the whole of the court's oral charge, where the same consisted of several paragraphs, is not sustained, unless the whole charge is bad.
2. *Same; Instructions; Duty to Request.*—The fact that the court had failed to charge on all the offenses embraced in the indictment, cannot be taken advantage of in the absence of requested specific instructions covering such matter.
3. *Some; Charge; Construction.*—Although a charge in a criminal case consists of separate paragraphs, it must be construed as a whole.
4. *Homicide; Instruction.*—A charge asserting that intent to take the life of the person assaulted was an essential element of the offense, and that unless, if the intent had been consummated, the offense would have been murder, there could be no conviction of a felony; that where there is an assault, the guilt or innocence of the felony necessitates the inquiry, if death had ensued, whether the offense would have been murder, and hence, if there was no intent to murder deceased, but defendant shot to defend himself against an assault endangering his life or which put him in danger of great bodily harm, defendant was not guilty, was bad in form and misleading in not stating the conditions authorizing the conclusion that the defendant acted in self defense.

APPEAL from Lauderdale Circuit Court.
Heard before Hon. JOSEPH H. NATHAN.

[Grisham v. The State.]

The defendant was indicted, tried, and convicted of assault with intent to murder Oscar Thornton. The evidence tended to show that defendant shot Thornton with a pistol in a difficulty growing up out of the fact that defendant had run away with Thornton's sister and married her. The evidence for the defendant tended to show that Thornton commenced the difficulty, and that while both were on the ground scuffling defendant's pistol fell out of his pocket. That when this happened Thornton jumped up and made as if to draw something from his pocket, when defendant grabbed up his pistol and fired. Also tended to show that threats had been made by Thornton against the defendant. The oral charge of the court is set out in full in the transcript and relates only to the offense charged in the indictment. The exception to the charge seems to be that the court either failed or refused to charge as to assault and battery and simple assault. Several paragraphs of the written charge are not necessary here to be set out because not treated of in the opinion. The defendant requested the following written charge which was refused: "(1) The essential element of the statutory offense of an assault with intent to murder—that which converts it into a felony—is the intent to take the life of the person assaulted. Unless if the intent had been consummated, the offense would have been murder in one or the other of its degrees, there can be no conviction of the felony. Where there is evidence of the assault, as in this case, the determination of guilt or innocence of the felony necessitates the inquiry if death had ensued would the offense have been murder. If, therefore, the jury find from the evidence that there was no intent to murder Thornton on the part of the defendant, but that he shot to defend himself against assault endangering his life, or which put him in danger of great bodily harm, you will render a verdict of not guilty of the charge of an assault with intent to murder."

EMMETT O'NEAL, for appellant.—The court erred in failing to charge the jury as to all the offenses embraced in the indictment. This rendered it necessary to find that the defendant was guilty as charged or to acquit and con-

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sequently withdrew from the jury their discretion to find for a lower grade of the offense.—*Gafford v. The State*, 125 Ala. 9; *Edgar v. The State*, 43 Ala. 312; *Beasley v. The State*, 50 Ala. 149; *Swoope v. The State*, 115 Ala. 42; *Brown v. The State*, 109 Ala. 70; *Evans v. The State*. The court erred in his written charge in not requiring that the evidence must convince beyond all reasonable doubt before there could be a conviction.—*Brown v. The State*, 39 So. Rep. 719. Premeditation is an essential element of assault with intent to murder.—*Smith v. State*, 141 Ala. 59. The court also omitted an essential element in leaving out the intent to take the life of the person assaulted.—*Laurence v. The State*, 84 Ala. 424; *Meredith v. The State*, 60 Ala. 441. The oral charge also misplaced the burden of proof.—*Brown v. The State*, 39 So. Rep. 719; *McDaniel v. The State*, 76 Ala. 1; *Keith v. The State*, 97 Ala. 32.

MASSEY WILSON, Attorney-General, for State.—The exception to the general charge of the court is unavailing unless it is bad in all parts.—*Postal Co. v. Hulsey*, 132 Ala. 444; *Austin v. The State*, 109 Ala. 51. The defendant should have made written request for instructions on any phase of the case the court did not charge on.—*Fuller v. The State*, 97 Ala. 27. But the evidence warranted only finding of guilt as charged or innocence by reason of self-defense. So the court was under no duty to charge as to any other thing.—*Gafford v. The State*, 125 Ala. 1; *Williams v. The State*, 130 Ala. 107; *Hunt v. The State*, 135 Ala. 1.

HARALSON, J.—The defendant excepted to the oral charge of the court as a whole. It consisted of several paragraphs, each of which was not bad, which must be the case, to condemn the whole charge.—*Postal Tel. Co. v. Hulsey*, 132 Ala. 461, 31 South. 527.

The exception to the charge as a whole was, "that the court had failed to charge on all the offenses embraced in the indictment." The court cannot be put in error for a mere failure or refusal to instruct orally upon a certain

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conceived phase of the testimony. The defendant should have requested specific instructions good in point of law and appropriate to the evidence.—*Williams v. State*, 147 Ala. 10, 41 South. 882.

It is familiar, that in a charge of the court consisting of several paragraphs, they must all be construed together, and when thus construed, they are a proper declaration of the law applicable to the whole testimony, such charge is not erroneous, though parts of it standing alone might be subject to criticism.—*R. & D. R. Co. v. Weemes*, 97 Ala. 270, 12 South. 186; 2 Mayfield's Dig. 561, § 15.

The defendant, after the delivery of this charge, excepted to several designated portions of it, disconnected from the entire charge, as though such designated portions were separate and independent charges. They could not be thus wrested from the entire charge unexplained by the other portion of it. Without the context and the light shed upon these portions of the charge, to which exceptions were reserved, and taken separately as defendant's counsel propose to do, some of them would be erroneous statements of law; but when the whole charge is read and construed together, we have been unable to agree to the criticisms made on its several parts.

Charge 1, requested by the defendant, and refused was bad in form. If the jury should have desired to acquit as to the highest grade of felony charged and to convict of a lower grade, the proper verdict would not have been that which the charge required. It was also misleading in dealing with self-defense, without properly stating the conditions authorizing the conclusion that defendant acted in self-defense.

Affirmed.

WEAKLEY, C. J., and SIMPSON and DENSON, JJ., concur.

[Ray v. The State.]

Ray v. The State.*Assault with Intent to Murder.*

(Decided June 5th, 1906. 41 So. Rep. 519.)

1. *Homicide; Assault with Intent; Proof of Intent.*—Intent, in assault with intent to murder, like in murder, need not be specifically proven, but may be inferred by the jury from the character of the assault, the weapon used, and other attendant circumstances.
2. *Same; Instructions.*—A charge asserting that if accused shot B. with intent to kill him, and such shooting was done in a sudden rencounter or affray, by the use of a deadly weapon concealed before the commencement of the fight, and B. had no deadly weapon drawn, and accused was the assailant, the jury should find him guilty is erroneous, as an intent to murder and not to kill is necessary, and it is immaterial whether accused' weapon was concealed or not, as section 4856, Code 1896, applies only to cases of homicide, and not to assaults to murder. (Overruling *Scroggins v. State*, 120 Ala. 369; 25 So. Rep. 180.)
3. *Same; Harmless Error; Admission of Evidence.*—In a prosecution for assault with intent to murder it is immaterial whether or not accused had on a coat and that witness could not see his weapon until it was drawn, yet such testimony was part of the res gestae, and its admission was harmless error.
4. *Criminal Law; Evidence; Conversations.*—Where the State introduced parts of conversations, immaterial as evidence, the defendant was entitled to bring out all of the conversations, or give his version of it, and it was error to refuse to permit him to do so.

APPEAL from Mobile City Court.

Heard before the Hon O. J. SEMMES.

The defendant was indicted, tried, and convicted for assaulting one Blalock with a pistol with the intent to murder him. The evidence tended to show that Clarence Blalock was shot by defendant about November 1, 1904; that there were three pistol wounds, one near the

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knee, one in the shoulder, and one near the spine, in the back, opposite the tenth back bone. A conversation was introduced by the State between witness Blalock and a young lady at the depot in the waiting room named Claywell, when an officer interfered and said something to witness; that afterwards an altercation arose between witness and the officer, and a difficulty ensued, in which the officer struck witness and the witness struck the officer two or three times, when the officer put his hand behind his back and witness ran, when the shots were fired. The defendant offered to prove by its witness Wilkins the conversation between the young lady and the prosecutor just prior to the difficulty, and to that end asked a number of questions as to what that conversation was, to which the court sustained objections. The defendant endeavored to offer several sections of the Code of the city of Mobile relative to the duties of police officers, objection to which was sustained. The defendant excepted to the following part of the oral charge of the court: "If you find that a person has killed another by the use of unlawful force with a weapon calculated to take life in such a manner as calculated to produce death, the presumption would arise that the killing was intentional, unless the evidence which proves the killing, or some other evidence in the case, negatives this presumption." And: "The law is that where a killing is effected by the use of a deadly weapon, malice would be implied from the use of such a weapon, unless the evidence which shows the killing, or some other evidence in the case, negatives the presumption. The defendant requested the following charge, which was refused: Charge A: "Before a defendant can be convicted of an assault with intent to murder, the evidence must satisfy the jury beyond a reasonable doubt that he intended to murder the person assaulted. Proof that he intended to kill such person is not sufficient." At the request of the state the court gave the following written charge: "If the jury believe from the evidence beyond a reasonable doubt that the defendant shot Blalock with a pistol, with intent to kill him, in Mobile county, within three years before the finding of this indictment, and that such shooting was done in

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sudden encounter or affray, by the use of a deadly weapon which was concealed before the commencement of the fight, and that Blalock had no deadly weapon drawn, and that the defendant Ray was the assailant in said difficulty, they should find the defendant guilty of assaulting said Blalock with the intent to murder him."

GREGORY L. & H. T. SMITH, for appellant.—Section 4856 has been held applicable to assault with intent to murder.—*Scroggins v. The State*, 120 Ala. 372. If this be true, and the court so charged then the evidence offered by defendant as to the conversations and the actions of Blalock was relevant as showing who was the assailant.—*Scales v. The State*, 96 Ala. 75; *Mitchell v. The State*, 60 Ala. 26; *Ex parte Nettles*, 58 Ala. 75.

Besides all this the state introduced the conversation, and the defendant had the right to the whole of it.—*Gibson v. The State*, 91 Ala. 69.

It is submitted that the case of *Scroggins v. State*, *supra*, is in conflict with the other authorities in this state in holding that sec. 4856 is applicable to assault with intent to murder, and that on reason and authority it should not be made so.—*Ogletree v. The State*, 28 Ala. 693; *Wall v. The State*, 90 Ala. 618; *Washington et al. v. The State* 53, Ala. 33; *Moore v. The State*, 18 Ala. 531.

The court cannot properly charge the jury in a case of assault with intent to murder that the use of a deadly weapon raises the presumption in law of an intent to kill and also of malice.—*Ogletree v. State*, *supra*, 1 Bishop's Criminal Law, sec. 514; *Simpson v. The State*, 59 Ala. 10; *Moore v. The State*, *supra*. The court therefore erred in giving the charge excepted to and in refusing the charges asked by the defendant. Authorities *supra*.

MASSEY WILSON, Attorney-General, for State.—It has been too long settled now for an attempt to say that Sec. 4856 does not apply to cases like the one under consideration.—*Scroggins v. The State*, 120 Ala. 372; *Williams v. The State*, 77 Ala. 53; *Horn v. The State*, 98 Ala. 23; *Scales v. The State*, 96 Ala. 69. What Blalock said to the young lady was not a part of the *res gestae*, and

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comes within the rule of excluding proof of motive and intention, as well as of a previous difficulty.—*Fonville v. State*, 91 Ala. 39; *Seams v. State*, 84 Ala. 410; *Gordon v. State*, 140 Ala. 29.

The charge of the court on the presumptions attending the intentional use of deadly weapon was correct.—*McFlroy v. The State*, 75 Ala. 9; *Williams v. The State*, 77 Ala. 53; *Horn v. The State*, 98 Ala. 23.

ANDERSON, J.—The defendant was indicted and tried under section 4346 of the Code of 1896, which provides: "Any person who commits an assault upon another, with intent to murder," etc. And in order to convict the defendant it is incumbent upon the state to prove that the assault was committed with the intent to murder; but, like malicious intent in murder, it may be inferred by the jury from the character of the assault, the use of a deadly weapon, and the other attendant circumstances.—*Wails v. State*, 90 Ala. 618, 8 South. 680 (where the case of *Smith v. State*, 88 Ala. 23, 7 South. 103, is explained and qualified); *Ogletree v. State*, 28 Ala. 693; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Smith v. State*, 83 Ala. 26, 3 South. 551. Section 4856 of the Code of 1896, making a killing with a concealed weapon under certain conditions murder in the second degree, has no application to an assault to murder. Under the former the intent to murder is the very essence of the offense, while the statute with reference to the latter is intended to make certain homicides murder in the second degree, regardless of the intent.

A charge in a case of assault to murder, which predicates a conviction upon the use of a concealed weapon under certain conditions, regardless of the intent, is bad, notwithstanding it would be a good charge in a homicide case; and the case of *Scroggins v. State*, 120 Ala. 369, 25 South. 180, in so far as it holds that such a charge was good in cases of assault to murder is hereby overruled. The trial court erred in giving charge 1 requested by the state.

"It is not every assault with intent to kill that is an assault with intent to commit murder. There must be

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malice in the attempt to take human life to constitute this statutory felony. But, when the assault is made with a deadly weapon in sufficient proximity to inflict a deadly wound, the law implies malice from the use of such instrument, and casts on the defendant the burden of proving that the killing or attempt to kill was in self-defense, or, if successful, would only be manslaughter unless such defensive facts and circumstances are shown in the testimony which proves the killing, or attempt to kill."—*Williams v. State*, 77 Ala. 53; *Brown v. State*, 142 Ala. 287, 38 South. 268; *Hadley v. State*, 55 Ala. 31; *Sylvester v. State*, 72 Ala. 201. And This rule prevails in cases of like kind, as well as cases of murder. It is true the burden of proving the intent is on the state; but, when the state shows a certain kind of assault, as above indicated, it proves, prima facie, its case, unless the other evidence overcomes its prima facie proof; and the law only implies malice after the state proves its prima facie case and in the absence of proof of defensive facts and circumstances. There was no error in that part of the oral charge excepted to by the defendant.

Charge A, refused to the defendant, was fully covered by charge 3, given at his request.

While it was immaterial whether the pistol was concealed or not, the trial court committed no reversible error in permitting the witness Sullivan to testify that defendant had on a coat and that he could not see the pistol before he reached back and pulled it, as it was a part of the *res gestae*. The record discloses no exception by the defendant to the action of the court in permitting the witness to testify that the pistol was concealed.

While the conversation between Blalock and the young lady prior to the difficulty may not have been material or relevant evidence, yet it was proven by the state, and the defendant had the right to bring it all out or get his version of it.—*Gibson v. State*, 91 Ala. 69, 9 South. 171; *Dobson v. State*, 86 Ala. 63, 5 South. 485.

There was no error in sustaining the state's objection to the introduction of the city ordinances upon the present state of the record.

[Williams v. The State.]

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, SIMPSON, and DENSON, JJ., concur.

HARALSON and DOWDELL, JJ., dissent as to charge 1, given at the request of the state, and think it was properly given.

Williams v. The State.

Murder.

(Decided June 7th, 1906. 41 So. Rep. 992.)

1. *Criminal Law; Appeal; Presumptions.*—The indictment was preferred at a special term of the court held on May 22nd, 1905. In another county in the same circuit, the statute required that the court begin in regular session on May 15th, 1905. There is an absence of evidence as to whether the court in the other county in the same circuit was in session or had adjourned. Under such a state of facts, it will be presumed on an appeal from a conviction had at a trial at such special term that the regular term of the circuit court in the certain other county of the circuit was adjourned at the end of the first week of its session preceding the commencement of the special term.
2. *Criminal Law; Appeal; Record; Review.*—The ruling of the circuit court sustaining demurrers to pleas which is not shown by the record proper, but only by bill of exceptions, are not reviewable on appeal.
3. *Courts; Simultaneous Terms.*—The regular circuit judge may hold special terms during the session of a regular term of court in his circuit, under Sections 928 and 930, Code 1896.
4. *Criminal Law; Change of Venue; Order of Judge.*—The ex parte order of the Judge issued to a sheriff of another county ordering him to retain possession and custody of the defendant was not a judicial ascertainment that there was danger of violence to the defendant if placed in the jail of the county where the crime was committed, on the issue of facts presented by a petition for a change of venue, because of prejudice on the part of the inhabitants of the county where the crime was committed.
5. *Jury; Service; Excuse.*—The court has authority in a criminal case to excuse a juror on account of his wife's condition demanding his personal attention.

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6. *Criminal Law; Evidence; Non Expert Testimony.*—A non expert witness on pistol or gun shot wounds may testify that a wound made by a bullet was a penetrating one, if he had examined the same.
7. *Homicide; Evidence; Writ of Possession.*—Where the evidence showed that the deceased and an officer were attempting to execute a writ of possession against defendant when the killing occurred, the writ was admissible, even in the absence of direct proof that the lands described in the writ were the lands on which defendant resided and from which he was sought to be ejected, there being evidence affording an inference as to that fact.
8. *Criminal Law; Evidence; Res Gestae.*—Declarations of the accused made while at the scene of the killing in the presence of the body of deceased, with a pistol still in his hands, are admissible as part of the res gestae without regard to proof that they were voluntary.
9. *Same; Expert Testimony.*—An expert is entitled to express his opinion as to where the bullet which produced deceased's death entered his head.
10. *Same; Res Gestae; Continuous Transactions.*—Evidence of the details of what occurred at the time of the killing, constituting as it does one continuous transaction, is admissible as res gestae.
11. *Homicide; Evidence; Threats.*—Where the killing occurred during an attempt to eject defendant from certain premises, it was permissible to show that a year before the killing defendant told witness he had decided not to give up the possession of the property, and if they came to put him out, he or they would die before they would get it.
12. *Witnesses; Impeachment; Predicate.*—An impeaching question was properly disallowed which was foreign to the matter laid in the predicate.
13. *Criminal Law; Instructions; Failure to Charge; Appeal; Review.*—A request orally to have the court instruct the jury on the law of self defense and an exception reserved to the failure or refusal of the court to do so, presents no question for review on appeal.
14. *Same; Instructions; Modification.*—At the defendant's request, the court in writing instructed that unless each and every member of the jury was convinced beyond all reasonable doubt of the defendant's guilt, under the evidence in the case, they should not convict him; and, that unless every juror believed beyond all reasonable doubt that defendant killed deceased by shooting him with a pistol, within the county, before the

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finding of the indictment, and that such killing was wilful and deliberate and premeditated and malicious, the defendant could not be found guilty of murder in the first degree. The court added that the first instruction simply meant that the jurors must all agree on the verdict, and that all twelve must agree before they could return any verdict, and that the second instruction simply meant that all the jurors must agree on the elements of murder in the first degree. Held, not error

15. *Homicide; Instructions.*—A charge asserting that the necessity that would justify the taking of human life need not be actual, but the circumstances must be such as to impress on the mind of the slayer a reasonable belief that such necessity was impending, is objectionable, in not postulating that the circumstances were such as to reasonably impress, and did impress, the defendant with the belief that he was in great and imminent peril.
16. *Same; Defense of Habitation.*—As against persons attempting to eject defendant under a lawful writ of possession, the rule that a person is entitled to defend his habitation even to the taking of life when invading the same, has no application.
17. *Criminal Law; Instructions; Refusal.*—The court will not be put in error for refusing instructions substantially covered by instruction given.
18. *Homicide; Self Defense; Misleading Instructions.*—The evidence being such that the jury might have found that the defendant deliberately shot deceased after the officer had begun to run, an instruction that if the officer presented his pistol at defendant in a threatening manner, and defendant was free from fault in bringing on the difficulty, defendant had the right under the law, to shoot at the officer in self defense, which right was not limited to cases of necessity, real or apparent on account of danger to life or limb, but extended equally to the danger of great bodily harm, was misleading and properly refused.
19. *Criminal Law; Argumentative Instructions.*—An instruction asserting that the jury should view the testimony of a witness in the light of the fact that the defendant had shot at witness at the time of the killing, was argumentative and properly refused.

APPEAL from Cullman Circuit Court.

Heard before HON. D. W. SPEAKE.

The defendant was indicted, tried and convicted for the murder of R. L. Hipp. The indictment was preferred and the trial had at a special term of the Cullman circuit court held by order of the presiding judge of the Eighth

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judicial circuit. The killing is alleged to have occurred on the 11th day of April, and the order for the special term was made the 18th day of April, 1905, calling the special term to convene on May 22, 1905. The defendant moved a change of venue upon the grounds that on account of public sentiment and the fact that the defendant was a poor, obscure, and unknown man, and the deceased a prominent and influential man, the defendant could not get a fair and impartial trial. Numerous affidavits were offered for and against the motion. The order of the court calling the special term was attempted to be offered in support of the motion, as was also the order of the court removing the prisoner from the Cullman jail to the Madison count jail. The newspaper account of the killing and of the history of the parties connected therewith, together with their account of the state of public feeling, was also offered. The court overruled the motion and put the defendant upon the trial. In selecting the jury, one Wright was called and examined under oath, pronounced competent by the court, and accepted by both state and defendant as a juror; but before he was sworn in, he stated on oath that his wife's condition was such as absolutely to demand his presence and attention, whereupon the court excused him, and the defendant excepted. Dr. R. H. Beard testified that he saw the body of Hipp the night of the day he was killed, and that there were wounds upon it, one under the eye and one in the back of the head; the last-named one being a penetrating wound, entering from the back of the head just above the right ear and a little back of it. The defendant objected to the statement on the ground that the witness was not shown to be an expert. The evidence tended to show that Deputy Sheriff Dunlap, together with Hipp and others, had gone out to the house of Williams; the deputy sheriff having in his possession a writ of possession issued from the circuit court against Williams to remove him from the possession of the house and lands he was then occupying. That Hipp was the attorney for the plaintiff in the writ and was there to receive the possession of the house and land from the deputy sheriff. The state offered to introduce this writ of possession in evidence, but the

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defendant objected, and the court overruled the objection.

The assignments of error referred to in the opinion are as follows: "(12) In overruling appellant's objection to the solicitor's question to witness Woodruff, 'You asked Williams where the others were,' and in holding 'The predicate is sufficient.' (13) In overruling appellant's motion to exclude statement of witness Woodruff that 'they all got away but him, and he was not able;' said expression being attributed to defendant. (14) In overruling the defendant's objection to the solicitor's question to the witness Woodruff: 'Was there anything said about where he was hit or anything of that sort—about where the ball hit him? * * * (16) In overruling defendant's objection to solicitor's question to witness Ascue, 'what did you hear Williams say?'"

The witness Woodruff testified as follows: "I was at Williams' house after the tragedy. When I got there, I saw Hipp lying with his feet upon the veranda and his face toward the ground. He was shot. Williams was walking in the back yard about ten steps from the porch and near the well with a pistol in his hand. Mr. Hall came up and asked Williams where were the rest of them, and Williams said they all got away but 'that one, and he is hardly able to get away.' Williams was about ten steps from Hipp's body when I saw him." Witness then testified that he did not threaten Williams; that he had no gun, stick, or pistol, and did not promise Williams anything, nor offer him anything, to tell what had occurred, nor tell him that it would be better to tell something about the matter. "No one took hold of Williams. Gober did not threaten him or promise him anything or make any demonstration against him." The solicitor asked the witness: "You asked him where the others were?" There was objection to this question, but the court held the predicate sufficient, and overruled defendant's objection. The defendant also moved the court to exclude the statement that Williams said that all got away but deceased, and he was not able, on the grounds that it was not a part of the *res gestae*, and that a proper predicate for its admission had not been laid. Witness testifying

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further, said: "I washed Mr. Hipp's face." The solicitor then asked: "Was anything said there about where he was hit, or anything of that sort—about where the ball hit him?" Defendant objected to the question as leading and irrelevant, and the court overruled the objection. Witness Noah Holmes testified that he was present at the time of the shooting; that he went to the house with Dunlap, Hipp and others. He further testified that while there he heard a report of a gun in the house; that he heard another report, and then saw Dunlap come out the door and turn to the left as he came out and run to the end of the porch, and then "Williams came to the door just as Dunlap went to jump off the porch, and Williams shot at him. Dunlap kept on around the house and Williams turned to the right and ran out in the yard and shot at Ryan." The solicitor asked, "Where was Ryan?" and the witness replied: "He was at the buggy where I was, and was running. Williams shot at Ryan, and, as well as I remember, turned to the right and ran to the gate that goes to the lot at the back end of the house and went around the house again." The defendant objected to all this testimony separately, but the objection was overruled. Ryan's testimony was of similar import. Newman testified that he knew Williams and had a conversation with him about a year before the date of his testimony, in which Williams said to him that he had decided not to give possession of his place, and that if they came out there to put him out, "he or they would die before he would get out." Ogletree was asked the following questions by the defendant: "I want to ask you whether or not W. T. Giles stated to you on Saturday following the shooting on Tuesday that he was there on the porch when the shooting occurred and saw the hand of the man from the door of the west room, and he never saw the man and never saw the man come in the room?" The state objected because no predicate had been laid. Giles in his previous testimony had stated, that he was in the hall and saw only the hand and pistol of the man who did the shooting; that he could not see the man himself on account of the door facing.

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At the conclusion of the testimony, the defendant requested a number of written charges, some of which were given, and some of which were refused. Charge B was given as follows: "Unless each and every member of the jury is convinced beyond all reasonable doubt of the guilt of the defendant from the evidence in the case, then you should not convict him." At the time he gave this charge, the court said: "That simply means, gentlemen of the jury, that you must all agree upon your verdict." Charge E: "Unless each and every juror is convinced beyond all reasonable doubt from the evidence in the case that the defendant killed Robert L. Hipp by shooting him with a pistol in this county, before the finding of this indictment, and that such killing was willful and deliberate and malicious and premeditated, you cannot find the defendant guilty of murder in the first degree." In giving this charge, the court said: "As I said before, all 12 of you must agree before you can return any verdict. This charge is to be taken and construed with the charge I have already given you, and it simply means that all of you must agree upon the elements of murder in the first degree before you can find the defendant guilty of murder in the first degree." Charge C: "The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with a reasonable belief that such necessity is impending." Charge D: "A man is not required to retreat from his own house before he strikes himself." Charge F: "The law regards with great jealousy and vigilance the peace and security of the dwelling house. A trespass upon it is more than a trespass upon property. It is a trespass upon the person." Charge G: "A man's house is his castle, and he may defend it, or himself in it, without retreating." Charge H: "The court charges the jury that, if the killing was the consequence of passion suddenly aroused by sufficient provocation, the jury cannot convict the defendant of murder in the first degree." Charge I: "If the jury believe from the evidence that Dunlap presented his pistol at the defendant in a threatening manner, and the defendant was free from fault in bringing on the difficulty, then the defendant

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had a right under the law to shoot at Dunlap in self-defense." Charge J: "In weighing the testimony of the witness Dunlap, the jury will consider the fact that he was shot by the defendant at the time of the alleged killing." Charge K: "The right of one in self-defense is not limited to cases of necessity, real or apparent, on account of danger to life, but extends equally to the danger of great bodily harm." Charge L: "Unless the evidence against the defendant is such as to exclude to a moral certainty every supposition or hypothesis but that of his guilt, you will find the defendant not guilty."

ERLE PETTUS, for appellant.—Change of venue is guaranteed by the constitution. Refusal to grant is revisable on appeal.—§ 5309, code 1896. In this case the motion for change of venue should have been granted.—*Hussey v. The State*, 87 Ala. 121; *Seams v. The State*, 84 Ala. 410; *Thompson v. The State*, 117 Ala. 17; 4 Ency. P. & P. 397.

The term of the circuit court of the 8th judicial circuit was regularly in session in Madison county, a county in said circuit, at the time the special term of the Cullman circuit court was called and held that returned the indictment in this case. The motion to quash the indictment, therefore, should have been sustained.—§ 906, code 1896; *Davis v. The State*, 48 Ala. 80; *Archer v. Ross*, 3 Ill. 303; 11 Cyc. pp. 729, 730, 735. The court should have quashed the venire because of the omission of Ogletree's name from the venire.—§ 5005 code 1896.

On account of the inflamed state of public opinion and under the facts submitted to the court, the defendant's motion for a continuance should have been granted.—*Huskey v. The State*, 129 Ala. 94; *White v. The State*, 86 Ala. 69. The court below erred in excusing the juror, Wright.—*Phillips v. The State*, 68 Ala. 469; *Boggs v. The State*, 45 Ala. 30; *Sullivan v. The State*, 102 Ala. 135.

The witness Beard was not shown to be an expert, and objection to his testimony as to the character of the wound should have been sustained.—*Rash v. The State*, 61 Ala. 89; 1 Greenleaf, 440. The writ of possession was

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improperly admitted.—*McCormack v. The State*, 102 Ala. 161; *Thompson v. The State*, 20 Ala. 54. The question to the witness, Woodruff, clearly called for a confession, and in the absence of the predicate, objection thereto should have been sustained.—*Redd v. The State*, 59 Ala. 255; *Young v. The State*, 68 Ala. 569; 1 Mayfield p. 204. The testimony of Holmes as to what defendant did after the shooting and the fact that witness heard two shots after the killing were not part of the *res gestae*, and should have been excluded.—*Garrett v. The State*, 76 Ala. 18; *Fonville v. The State*, 91 Ala. 39. The question to the witness, Ryan, "Where did you go," and his answer thereto should have been excluded.—*Fonville v. The State*, *supra*; *Thompson v. The State*, *supra*; *Tate v. The State*, 86 Ala. 33; *Moulton v. The State*, 88 Ala. 116. Allen's statement should have been excluded.—*Walker v. The State*, 58 Ala. 393; *Davis v. The State*, 17 Ala. 415. No sufficient predicate had been laid for the introduction of the confessions testified to by Hall.—*Redd v. The State*, 69 Ala. 255; *Amos v. The State*, 83 1; *Brister v. The State*, 26 Ala. 107; *Mann v. The State*, 36 Ala. 211. The statement of the witness, Hall, as to the caliber of the shells was a mere opinion and should have been excluded.—*Busby v. The State*, 77 Ala. 66; *McKee v. The State*, 82 Ala. 32; *Riley v. The State*, 88 Ala. 193. The threat testified to by Newman should have been excluded.—*Jones v. The State*, 76 Ala. 15; *Ford v. The State*, 71 Ala. 385; *Myers v. The State*, 62 Ala. 599. The defendant's question to the witness, Ogletree, should have been allowed.—*Tesney v. The State*, 77 Ala. 37.

The court erred in explaining and qualifying written charges B and E.—§ 3328, code 1896; *Lewis v. The State*, 96 Ala. 6. Under the evidence in this case the question of self-defense arose and should have been submitted to the jury.—*Story v. The State*, 71 Ala. 329; *Rogers v. The State*, 62 Ala. 170; *Oliver v. The State*, 17 Ala. 587.

If assaulted in his own home, defendant was under no duty to retreat.—*Martin v. The State*, 90 Ala. 602; *Harris v. The State*, 96 Ala. 24. The appellant had the right to infer that the deceased was aiding and abetting Dunlap, and it is inferable from the evidence that the bullet

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that killed the deceased was aimed at Dunlap. Hence, the doctrine of self-defense was applicable.—*Amos v. The State*, 83 Ala. 1; *Tidwell v. The State*, 70 Ala. 33; *Clarke v. The State*, 78 Ala. 474; *Bob v. The State*, 29 Ala. 20. Charge C should have been given.—*Oliver v. The State*, 17 Ala. 587; *Carrol v. The State*, 23 Ala. 28. So should charge D.—*Martin v. The State*, 90 Ala. 602; *Harris v. The State*, 96 Ala. 24. Charge F should have been given.—*Crawford v. The State*, 112 Ala. 1. So should have charge G.—*Asker v. The State*, 94 Ala. 4; *Brinkley v. The State*, 89 Ala. 34. Charge H was proper.—*Smith v. The State*, 83 Ala. 26; *Ex parte Sloan*, 95 Ala. 23. Charge I was improperly refused.—*Oliver v. The State*, 17 Ala. 587; *Compton v. The State*, 110 Ala. 24; *Rogers v. The State*, 62 Ala. 170. Charge J was improperly refused.—*Jones v. The State*, 76 Ala. 8; *Polk v. The State*, 62 Ala. 137. Charge K should have been given.—*Knowles v. The State*, 26 Ala. 31; *Holmes v. The State*, 23 Ala. 17. Charge L was improperly refused.—*Joc v. The State*, 38 Ala. 423.

MASSEY WILSON, Attorney General, GEORGE H. PARKER and JOHN A. LUSK, for the State.—The application for change of venue was properly refused.—§ 5309 code 1896; *Salm v. The State*, 89 Ala. 56; *Hawes v. The State*, 88 Ala. 37; *Scams v. The State*, 84 Ala. 410; *Byers v. The State*, 105 Ala. 38; *Terry v. The State*, 120 Ala. 286; *Lyde v. The State*, 133 Ala. 64; *Jackson v. The State*, 104 Ala. 1; *Daughdril v. The State*, 113 Ala. 7; *Hussey v. The State*, 87 Ala. 125; *Thompson v. The State*, 122 Ala. 12; *Rains v. The State*, 88 Ala. 91. The court called a special term for the trial of this cause.—30 A. & E. Ency. Law, pp. 512-13, note 4; *Sam v. The State*, 31 Miss. 485. The fact that there was a conflict between the special term and a regular term of the court in another county cannot render the proceedings void.—§§ 928 and 930, code 1896; *Daughdrill v. The State*, 113 Ala. 7; *Knight v. The State*, 116 Ala. 486. There was no good grounds for quashing the venire.—§ 5007, code 1896; Authorities next above. The fact that some of the jurors were not summoned is not good ground for quashing the venire.—

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28 So. Rep. 617. Motion for continuance is addressed to the sound discretion of the court.—5 Mayfield, p. 203. The court may excuse a juror for good cause after he has been accepted and sworn and even after the introduction of evidence.—*Yarbrough v. The State*, 105 Ala. 43; *Webb v. The State*, 100 Ala. 47; *Haues v. The State*, 88 Ala. 37; *Sanford v. The State*, 39 So. Rep. 371. There is no merit in the objection to the testimony of Beard as to the character of the wound.—*Littleton v. The State*, 128 Ala. 37; *Bush v. The State*, 61 Ala. 89; 1 Mayfield, p. 340; 5 Mayfield, p. 985.

The evidence in reference to the presence of the officers there, their purpose and authority is best illustrated by the process in their hands, hence the evidence relative to the process and the process itself were admissible.—1 Elliott on Evidence, § 312; Wharton on Homicide, p. 205; 21 A. & E. Ency. Law, (2nd Ed.) pp. 142-44.

It is elementary that all the surroundings and circumstances attending the killing, the declarations of the accused at and after the killing and his conduct at and after the killing while at or near the scene are admissible and form part of the *res gestae*.—*Hainsworth v. The State*, 136 Ala. 13; *Rolan v. The State*, 105 Ala. 41; *Youngblood v. The State*, 114 Ala. 697; *Carroll v. The State*, 23 Ala. 28.

A non-expert may testify as to the appearance of wounds.—*Pitts v. The State*, 140 Ala. 70; *Thomas v. The State*, 139 Ala. 80; *Terry v. The State*, 118 Ala. 80. The court was under no duty to charge on the doctrine of self-defense in the absence of written requested instructions on self-defense.—*Green v. The State*, 98 Ala. 14. The court's explanation of charges B and E was proper.—*Holmes v. The State*, 136 Ala. 80; *Jackson v. The State*, 1b. 22; *Wilson v. The State*, 140 Ala. 43. Charge C was properly refused.—*McClellan v. The State*, 140 Ala. 99. Charges D, F, and G were abstract and properly refused.—*Ex parte Smotherman*, 140 Ala. 168; *Floyd v. The State*, 82 Ala. 16; *Teague v. The State*, 120 Ala. 309; *Dryer v. The State*, 139 Ala. 117; *Williams v. The State*, 44 Ala. 41. Charge L was bad for omitting the qualifying word reasonable.—*Bowen v. The State*, 140 Ala. 65.

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TYSON, J.—The indictment upon which this defendant was tried and convicted was preferred by a grand jury organized at a special term of the court after notice that the court would be held had been given in conformity to the statutes.—§§ 914 and 915 of the code of 1896. The trial was also had at that special term.

The regularity of the order convening the court is assailed in only one particular. It is upon the point that the judge of the Eighth judicial circuit, who ordered the special term, and who presided over it, was without authority to hold it because he was at that date bound to be in attendance upon a regular session of the circuit court, in and for Madison county, which was in the same circuit with Cullman county, where this special term was being held. It is true the statute fixing the time for holding the regular term of the Madison circuit court requires that court to convene on the third Monday in May (and may continue four weeks) which, in the year 1905, was the 15th day of that month, and it is also true that the record shows this special term to have been convened on the 22nd day of that month; but it was not shown by evidence introduced in support of the motion to quash the indictment that the Madison court did not adjourn on the Saturday, the end of the first week of its session, preceding the commencing of the special term. It will not be seriously doubted that the judge may have properly exercised the authority that he had to adjourn the Madison court, and, in the absence of a showing to the contrary, it must be presumed that he exercised that authority properly, since error must be affirmatively shown.—*Smurr v. State*, 105 Ind. 125, 4 N. E. 445. The same question was also attempted to be raised by pleas to which a demurrer was sustained. But these pleas and the demurrer to them are made to appear here only in the bill of exceptions. This ruling of the court is therefore not revisable.—*Beck v. West*, 91 Ala. 312, 9 South. 199; *Brooks v. Rogers*, 101 Ala. 125, 13 South. 386, 3 Brickell's Dig. p. 456, § 13. But, aside from these considerations, the judge had ample authority to order the special term and hold it at the time it was held, although the Madison court may have been in session.

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We do not controvert the general doctrine that a court cannot be held at a time when there is clearly no authority to hold it; nor do we impugn the general rule that it is error to hold two courts in the same circuit at the same time where there is no statutory authorization for it. To see that such authority is conferred by our statutes we need only cite them.—§§ 928 and 930 of the code of 1896; Gen. Acts 1898-99, p. 236. The legislative provisions made in these statutes for the holding of regular terms by the supernumerary judge and special judges appointed by the governor clearly recognize the authority, and, indeed, impliedly, if not expressly, confer such authority on the circuit judge to hold special terms during the session of a regular term of the court.

After a careful examination of the evidence offered in support of and against the motion for a change of venue, we feel constrained to hold that it cannot be affirmed that the trial judge erred in denying the motion. It seems to us that the evidence in support of the application is much less convincing than was that in the *Haues Case*, where the application was held to have been properly denied (*Haues v. State*, 88 Ala. 39, 7 South. 302), and does not measure up to that in the *Thompson Case*, 117 Ala. 67, 23 South. 676, where it was held that the application should have been granted.—*Terry v. State*, 120 Ala. 286, 25 South. 176; *Thompson v. State*, 122 Ala. 12, 26 South. 141; *Daughdrill v. State*, 113 Ala. 7, 21 South. 378. The order of the presiding judge of date April 15, 1905, commanding the sheriff of Madison county to retain the custody of the defendant as a prisoner, was not a judicial ascertainment of the fact that there was danger of lawless violence to him if removed to or placed in the jail of Cullman county as against the state on the issue of fact presented by the application for a change of venue. It was purely an ex parte order, made without a hearing on the part of the state, and therefore was not binding as a judgment. To hold that it was a judicial determination of that fact or any other fact recited in it would vitiate the cardinal principle above referred to necessary to the efficacy of every decree or judgment. And, clearly, it is no more a judicial

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determination of that fact than it is of the further fact also recited in it that the jail of Cullman county was insufficient for the keeping of the prisoner.—§ 4961 of the code of 1896. The purpose of such orders is to protect the sheriff as an authorization to hold the prisoner and to prevent the latter's escape or to guard him against violence to his person. The order under consideration is clearly entitled to no more weight as evidence than an affidavit containing the same statements would be. The overruling of the motion to quash the venire is not insisted on as erroneous. But, if it was, it would clearly be without merit.—*Fields v. State*, 52 Ala. 348.

The trial court was authorized to excuse the juror Wright on account of his wife's condition which demanded his personal attention.—*Parsons v. State*, 22 Ala. 50; *Hawes' Case*, *supra*; *Yarbrough v. State*, 105 Ala. 43, 16 South. 758; *Sanford v. State*, (Ala.) 39 South. 370.

It does not require that a witness should be an expert on gunshot wounds in order to testify that a wound examined by him, made by a bullet, is a penetrating one. Nor is there any merit in the other objection interposed to the question propounded by the solicitor to Dr. Beard; or in the exception reserved to the ruling on the motion to exclude that witness' statement as to the range of the wound found by him in the head of Hipp, the deceased.—3 Mayfield's Dig. p. 965, § 235.

The only objection urged against the introduction of the writ of possession which Hipp, the deceased, and the deputy sheriff was attempting to execute, at the time of the homicide, is that there is no evidence in the record tending to show that the lands described in the writ are the same as those upon which the defendant resided and from which they were attempting to eject him. It is true there was no positive or direct proof of this fact offered, but the evidence affords an inference from which the jury may have inferred it. The writ was clearly relevant and competent.—1 Elliott on Ev. § 212; Wharton on Homicides, § 235, p. 205; 21 Am. & Eng. Ency. Law (2d Ed.) pp. 141-144.

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The matters made the basis of the twelfth, thirteenth, fourteenth, and sixteenth assignments of error, relating as they do to the conduct and declarations of defendant while at the scene of the killing with his pistol in his hand and in the presence of the deceased, being attendant circumstances, were a part of the *res gestae* of the occurrence or transaction that took place on that occasion, and were therefore competent without preliminary proof being made showing his declarations on that occasion to have been voluntary.—4 Elliott on Evidence, § 3029, and cases cited in notes. But aside from this consideration, the circumstances under which they were made repel all presumption that they were not voluntarily made.—*Gilmore v. State*, 126 Ala. 20, 36, 37, 28 South. 595, and cases there cited. This also disposes of the fifteenth, twenty-sixth, twenty-seventh, and twenty-eighth assignments of error adversely to appellant.

Dr. Stone was shown to be an expert. He was therefore competent to express his opinion as to the place of entrance on Hipp's head of the bullet that produced his death.

The testimony of witnesses Holmes and Ryan admitted by the trial court against defendant's objection was clearly competent. All of it related clearly to matters which were a part of the *res gestae* of the occurrence on the occasion of the homicide. Indeed, all the details of what occurred on that occasion were entirely competent as constituting one continuous transaction.—*Collins v. State*, 138 Ala. 57, 34 South. 993; *Churchwell v. State*, 117 Ala. 124, 23 South. 72; *Smith v. State*, 88 Ala. 73, 7 South. 52; *Scams v. State*, 84 Ala. 410, 4 South. 521.

The threats by defendant testified to by the witness Newman were clearly competent.—*Jordan v. State*, 79 Ala. 9; *Ford v. State*, 71 Ala. 385; 4 Elliott on Ev. § 3035.

The question propounded to the witness Ogletree, to which an objection was sustained, was not competent. If answered, it would not have tended to impeach Giles upon the matter laid in the predicate for his impeachment. In short, it was outside and foreign to the matter laid in the predicate. But, aside from this, the question was clearly otherwise objectionable.

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There are a number of other assignments of error, but they are so obviously without merit that we have not deemed it necessary to discuss them.

After the testimony had closed, and before the trial judge delivered his oral charge to the jury, the defendant in writing requested that he charge fully on the law of self-defense. It is also stated in the record that the judge failed in his oral charge to instruct the jury upon the law of self-defense. The exception reserved was to his failure or refusal to do so. Pretermittting all discussion of the question whether, under any phase of the testimony, the defendant was entitled to have the jury determine that he was justified in shooting at Dunlap, whom Hipp accompanied for the purpose of having the possession of the premises delivered to him as the agent of the plaintiff named in the writ, and conceding that defendant was so entitled, the exception reserved is unavailable to raise the question. Had the judge instructed the jury in his oral charge or a written charge had been given at the request of the solicitor asserting that defendant was not justified or excused, and an exception had been reserved to the oral charge, or if special charges had been requested by defendant raising the question of his justification or excuse and refused, then undoubtedly the ruling could be reviewed. But here we have a mere nondirection by the judge—a mere failure or refusal to instruct the jury orally upon a certain conceived phase of the testimony. This is wholly ineffectual to present for revision the question sought to be reviewed.—§§ 3326 and 3328 of the code of 1896; *Herbert v. Huie*, 1 Ala. 18, 34 Am. Dec. 755; *Green v. State*, 98 Ala. 14, 13 South. 482; 2 Thompson on Trials, § 2341. Mr. Thompson, in the section above cited, speaking to this point, says: "It is, then, a general rule of procedure, subject in this country to a few statutory innovations, that mere nondirection, partial or total, is not a ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused."

Th court's explanations of charges B and E were not improper.—*Holmes v. State*, 136 Ala. 80, 84, 34 South.

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180; *Jackson v. State*, 136 Ala. 22, 34 South. 188; *Newill v. State*, 133 Ala. 99, 32 South. 596.

Suffice it to say of charge C, refused defendant, that it was faulty in not postulating that the circumstances were such as to reasonably impress him, and did so impress him, that he was in great and imminent peril.—*McClellan v. State*, 140 Ala. 99, 103, 37 South. 239.

Charges D, F, and G were calculated to mislead the jury, if not otherwise bad. The rule of habitation does not apply when the person killed has the lawful right to be in the dwelling of his slayer for the purpose of executing a writ of possession. The writ in this case armed those executing it with the right to the possession of the dwelling to eject the defendant and his household goods from it. They were in no sense trespassers, nor were they committing an unlawful act in their attempt to dispossess him and to place the owner of it in possession.—*Harrigan & Thompson's Cases on Self-Defense*, pp. 713, 720, 900-904; 25 Am. & Eng. Ency. Lay (2d Ed.) p. 278.

Charge H was a duplicate of charge 4 that was given for defendant.

Charges I and K were each calculated to mislead the jury. There was testimony from which they were authorized to find that defendant deliberately shot Hipp after Dunlap had begun to run.

Charge J was a mere argument. Charge L was correctly refused.—*Bowen v. State*, 140 Ala. 65, 67, 37 South. 233.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Murder.

(Decided July 6th, 1906. 41 So. Rep. 973.)

1. *Jury; List; Preparation.*—A special or other jury venire drawn from a box that contained the names of the resident citizens of only a portion of the county is fatally defective under Section 4982, Code 1896.
2. *Criminal Law; Conversation of Conspirators; Admissibility.*—Conversations had between defendant and two other persons, immediately before the killing, tending to show a conspiracy between the parties to the conversation to kill the deceased or to do him great bodily harm is admissible in evidence.
3. *Witnesses; Bias.*—When a witness for the defendant denied making threats against the deceased, and stated that he and deceased were on friendly terms, it was competent to show that witness had made threats against deceased, although made sometime before the killing as tending to show his feelings for deceased and his bias towards defendant.
4. *Criminal Law; Trial; Evidence.*—Evidence incompetent when offered is cured of error if it is afterwards rendered competent.
5. *Same; Limitation of Evidence; Duty of Defendant to Request Limitation.*—Where certain evidence is admissible for a particular purpose only, if defendant desired that it should be limited to that purpose, he should ask instructions from the court to the jury as to such limitation.
6. *Same; Trial; Argument of Counsel.*—Defendant's counsel in argument asked why an alleged co-conspirator was never indicted, and why the State had not produced him. Replying, the solicitor said that if any one was expected to produce such co-conspirator, it was the defendant, as they were on friendly terms and it would be easier for the defendant and the co-conspirator to prove it if no conspiracy existed. Held, that while the remarks of defendant's attorney were improper and could have been excluded, it was not error not to exclude the reply thereto, on the theory that illegal evidence may be rebutted by evidence of the same character.
7. *Homicide; Instructions.*—A charge instructing the jury that if deceased accused defendant of meddling with or encouraging

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the difficulty between deceased and another, then defendant had the right to deny such accusation, if it were false, in no uncertain terms, and that if deceased and another were having a difficulty the day deceased was killed, and deceased accused defendant of encouraging the same, it was defendant's duty to emphatically deny such accusation, and that to have been accused of it and not to have denied it would have been a circumstance against him, was properly refused as tending to create in the minds of the jury the idea that defendant was entitled, as a matter of law, to deny the accusation in such manner as to provoke or encourage the difficulty which ensued between them.

8. *Criminal Law; Province of Jury.*—Charges asserting that the evidence fails to show a conspiracy between defendant and certain others to take deceased life; and that if the jury believe the evidence, defendant could not be convicted on the theory that he had entered into a conspiracy, are invasive of the province of the jury and are properly refused.
9. *Same; Instructions as to Evidence.*—A charge asserting that the evidence of a witness taken on preliminary examination was not the evidence the jury should consider as his on this trial, but the jury should take the written showing signed by defendant as being the evidence the witness would give, if present, and give it the same weight as if the witness had testified on the stand, in effect excluded a portion of the evidence from the consideration of the jury and was properly refused.
10. *Homicide; Instructions; Freedom from Fault.*—A charge on self defense which pretermits consideration of defendant's freedom from fault in producing the necessity to take deceased life and of defendant's duty to retreat is properly refused.
11. *Same; Co-defendants; Misleading Charges.*—Where there were tendencies in the evidence to show a conspiracy between defendant and another, a charge asserting that defendant could not be convicted unless the evidence established his guilt independent of the other beyond all reasonable doubt was misleading and properly refused.

APPEAL from Clay Circuit Court.

Heard before HON. JOHN PELHAM.

The defendant and Barney Worthey were jointly indicted for killing Tom Waldrop by shooting him with a gun or pistol. The present defendant demanded a severance, and was tried alone. When the case was called at a former term of the court motion was made to quash

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the special venire. The facts upon which this motion was based were that the jury commissioners, in drawing the grand jurors and petit jurors for the court, discarded six names, and discovering that there were not enough names left in the jury box from which to draw special venire, partially filled the box by putting therein the names of the qualified male citizens in beats 10 and 11 and part of 14. The court granted the motion to quash the venire, continued the cause, and declared the jury box invalid. The commissioners then met, discarded the old jury box, and made up a new jury box by placing therein the names of all the qualified male citizens of the county. From this new box, the special venire to try this particular case was drawn. The defendant objected to the drawing of a special jury from this box and for grounds of objection set out the facts as above stated. This objection being overruled, and the special venire being drawn from the box, he made a motion to quash the special venire on the ground and facts as above set out. The motion to quash was overruled.

The State offered testimony tending to show that just previous to the difficulty Bud Orr called defendant into the store near which the difficulty took place and asked him if he was going to stick up to him as he promised to do, as he was about to have some trouble. Worthey also called defendant and asked him if he was going to stick up to old man Bud Orr, as it was agreed that they should do, and defendant replied that he was, and Worthey replied be sure and run a little before you do it. That immediately after the conversation defendant walked out of the store and commenced the difficulty by calling deceased a d——ned liar, and in which difficulty the fatal shooting occurred. The evidence in this connection tended to show that immediately after these conversations and after the lie had been passed, deceased went into the store and procured some weights and attempted to strike the defendant but was prevented from doing so. That deceased was on one side of the store building and Hanners and Worthey on the other side with a crowd around them. That Hanners pushed the crowd aside with the assistance of Worthey, and came around

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the corner of the store to where he could see deceased when he commenced to fire on deceased inflicting the fatal wound. Worthey then remarked: "Well, you have fixed him now, and we had better go," and defended and said, "Yes, get your horse and we will go." The other facts necessary to an understanding of the opinion sufficiently appear therein. The counsel in arguing the case for the defendant, said: "The solicitor claims a conspiracy in this case between the defendant, Barney Worthey, and Bud Orr. Why was Bud Orr never indicted? If he was in the conspiracy, why hasn't the state got him here? Where is Bud Orr?" No objection was interposed to this argument. The solicitor, in his closing argument, said: "Defendant's counsel has asked why it is that the state did not have Bud Orr here upon the trial of this cause. It seems to me that if any one could be expected to have Orr here, it would be the defendant. From the evidence it is clearly shown that Orr and the defendant and his co-conspirator, Worthey, were friendly, and together that day, and if no conspiracy existed between these parties, it would be an easy matter for them to have all been present in order to explain or deny the conspiracy. Defendant objected to this argument and moved to exclude it.

The defendant requested the following written charges which were refused: "(3) I charge you that if you believe from the evidence that Waldrop accused Hanners of meddling with or encouraging the difficulty between Waldrop and Orr, then it was Hanners' right to have repudiated any such accusation if it was false in no uncertain terms. (4) I charge you that the evidence in this case fails to show that there was any conspiracy between Hanners and Worthey, or Hanners, Orr and Worthey to take the life of Waldrop. (5) I charge you that if you believe the evidence in this case, the defendant could not be convicted on the theory that he had entered into a conspiracy to take the life of Waldrop. (6) I charge you that the evidence of Jim Cotney on the preliminary trial is not the evidence that you must consider as being the evidence of Cotney on the present trial, but you will take the written showing signed by Hanners as being

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exactly what Cotney would swear if present, and give it just such weight and consider it just as you would if Cotney had been here, and sworn to it from the stand " "(10) I charge you that if you beleve from the evidence that Waldrop had a shotgun in his hand in a threatening manner and Hanners heard a number of voices holler-ing, 'Look out, George, he is going to shoot you with a shotgun,' and that Hanners immediately stepped from behind the corner of the house and saw Waldrop with a gun pointing towards him. and acting in the honest be-lief that he was in danger of being shot and killed by Waldrop, then it would make no difference whether Wal-drop was really aiming to shoot or not, your verdict should be not guilty. (11) I charge you that if you be-lieve from the evidence that Bud Orr and Waldrop had been having a difficulty there the day Waldrop was killed and that Waldrop accused Hanners of encouraging said difficulty, then it was not only Hanners' right, but it was his duty, to emphatically deny any such accusation, and that to have been accused of it, and not denied it, would have been a circumstance against him. (12) I charge you that you are not trying Barney Worthey, but you are trying George Hanners, and you cannot convict Han-ners unless the evidence shows his guilt independent of Barney Worthey, beyond all reasonable doubt." "(21) I charge you that if Hanners shot with bona fide belief that he was in great danger of being shot by Waldrop then it would make no difference whether Hanners was in danger or not, your verdict should be not guilty."

D. H. RIDDLE, for appellant.—The conversation be-tween Orr and Hanners before the killing was inadmissi-ble.—*Fouville v. The State*; 91 Ala. 39; *Domingus v. The State*, 94 Ala. 12. Threats are not admissible when made by a co-conspirator against a co-defendant being tried separately, unless it is shown that a conspiracy ex-isted at the time the threats were made.—*Langford v. The State*, 130 Ala. 74; Greenleaf on Evidence (16th Ed.). § 94; 6 A. & E. Ency. Law, 867. The court erred in permitting the solicitor to argue to the jury that the defendant ought to have Orr there as a witness.—*Eth-*

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ridge v. The State, 124 Ala. 106; *Crawford v. The State*, 112 Ala. 1. Charge 6 is a correct proposition of law. Charge 10 should have been given, as should have charge 21.—*Kennedy v. The State*, 140 Ala. 1.

MASSEY WILSON, Attorney General, and BORDEN H. BURR, for the State.—The court's action in reference to the jury box at the present and subsequent terms of the court was without error.—§ 4985, code 1896; *West v. The State*, 118 Ala. 100; *Shelton v. The State*, 73 Ala. 5. If error, in the absence of fraud shown, it is cured by § 4997, code 1896.—*Stewart v. The State*, 137 Ala. 33. A conversation between Orr and the defendant was properly admitted as a part of the *res gestae*.—*Henry v. The State*, 107 Ala. 22; *Plant v. The State*, 140 Ala. 52; *Campbell v. The State*, 133 Ala. 81. It was also properly admitted as tending to show conspiracy.—*Bonner v. The State*, 107 Ala. 97; *Martin v. The State*, 136 Ala. 32; *Smith v. The State*, 136 Ala. 1; *Buford v. The State*, 132 Ala. 6. The testimony of witness, Dawkins, as to the conversation of the defendant and his co-defendant was properly admitted.—*Buford v. The State*, *supra*; *Thomas v. The State*, 130 Ala. 62; *Jolly v. The State*, 94 Ala. 19. Threats made by co-defendant, Worthey, were admissible.—*Ray v. The State*, 126 Ala. 9; *Finch v. The State*, 81 Ala. 41; *King v. The State*, 90 Ala. 612. The argument of the solicitor was not improper.—*Dollar v. The State*, 99 Ala. 236.

The request for written instruction was general and if any instruction was bad, the court will not be in error for refusing all.—*Viberg v. The State*, 137 Ala. 73. Charge 3 is an argument, and it fails to hypothesize the elements of self-defense.—*McClellan v. The State*, 140 Ala. 99; *Plant v. The State*, 1b. 52. Charge 21 is also bad.—*McClellan v. The State*, *supra*.

TYSON, J.—In support of the motion to quash the special venire drawn for the trial of the case, it appears, by the agreed statement of facts, that at a former term of the court, on motion of the defendant, the special venire drawn for the trial of his case was quashed because

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of the illegality in the preparation of the box by the jury commissioners containing the names from which juries are required to be drawn, and properly so.—§ 4982, Code 1896. It is also made to appear, that the jury commissioners subsequently prepared another box in all respects, as required by the statutes, and it was from this box containing the names of the qualified jurors that the special venire was drawn to which the objection here urged was taken. There is no merit in it.—*West v. State*, 118 Ala. 100, 24 South. 48. The conversation had between defendant, Orr, and Worthey, which the testimony on the part of the state tends to establish, just immediately before the difficulty took place, in which the killing occurred, under the circumstances shown by the testimony, were clearly competent. If believed by the jury they tended to illustrate the subsequent conduct of defendant, and to give meaning and point to it, and also tended to show a conspiracy between those parties to do grievous bodily harm to or to take the life of the deceased.—*Smith v. State*, 136 Ala. 1, 34 South. 168; *Bonner v. State*, 107 Ala. 97, 18 South. 226.

It may be conceded for the purpose of this case that the threats by Worthey against the deceased, indulged in long before the fatal encounter, if made, were not competent for any purpose other than to show his hostility to the prosecution and his bias for the defendant. And it may be further conceded that they would have been inadmissible unless Worthey had testified as a witness for defendant. But this he did. In his testimony, he not only denied making the threats, but testified that he and deceased were on friendly relations with each other. They were clearly competent for the purposes indicated above.—*Haralson v. State*, 82 Ala. 47, 2 South. 765; *People v. Brooks*, (N. Y.) 30 N. E. 189, and cases there cited. Nor was it of consequence that this testimony may have been incompetent at the time it was offered, if it was subsequently rendered so, as was done.—*Ray v. State*, 126 Ala. 9, 28 South. 634. If the defendant perceived that this evidence should have been limited in its consideration by the jury to the purposes, for which we have said it was competent, he should have made a re-

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quest of the court to that end. He had no right to have it excluded.—*Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133. In view of the remarks of defendant's counsel in his speech to the jury, we are unwilling to affirm that the remarks of the solicitor in reply thereto should have been excluded. It may be admitted that the prosecution had the right to have the remarks of opposing counsel excluded (*Crawford v. State*, 112 Ala. 1, 21 South. 214), but this not being done, the right to reply to them cannot be seriously doubted, upon the same principle often recognized by this court that illegal evidence may be rebutted by evidence of the same character. The court committed no error, therefore on this point. This brings us to a consideration of the charges refused to defendant. Charges 3 and 11 requested by him are each an argument, and, besides, were calculated to mislead the jury to the conclusion that he had the right, as a matter of law, to repudiate the accusation made by the deceased in such language as was calculated to provoke or encourage the difficulty which ensued between them. Furthermore, there was evidence from which the jury may have inferred that his reply was for the purpose of bringing on the difficulty which had been preconceived and planned. Charges 4 and 5 clearly invade the province of the jury. Whether there was a conspiracy between defendant and Worthey or between defendant, Worthey, and Orr, was a question of fact, under the testimony, for the determination of the jury. Charge 6 sought to have the jury to exclude from their consideration a part of the testimony and was, therefore, bad. Charge 10 pretermits all consideration of defendant's freedom from fault in producing the necessity to take the life of the deceased as well as his duty to retreat. In view of the tendency of the evidence showing a conspiracy between defendant and Worthey, charge 12 was properly refused, as being calculated to mislead the jury. Charge 21 is subject to the same vice as charge 10. It is wholly unlike the one approved in *Kennedy v. State*, 140 Ala. 1, 37 South. 90, as will readily appear by a comparison with it, and with what was there said with respect to that charge.

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There was no error shown by the record, and the judgment must be affirmed.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Murder.

(Decided July 6, 1906. 41 So. Rep. 774.)

1. *Homicide; Evidence.*—It having been shown that deceased was killed by a shot from a gun; that two shots were fired at the time of the killing, and that two empty shells bearing a certain mark were found near the place of the killing; that at the time of the arrest of defendant and his codefendant a number of shells were found on defendant, some bearing the certain mark, the shells found near the place of the killing were admissible in evidence as tending to show, in connection with the other evidence, that defendant fired them on the occasion of the killing.
2. *Witnesses; Competency; Conviction of Felony; Credibility.*—A conviction for a felony, whether statutory or otherwise, may be shown for the purpose of affecting the credibility of a witness under § 1795, Code 1896, and this may be shown by oral proof without the production of the record.
3. *Criminal Law; Instructions; Abstract Charges.*—As evidence of whether a witness was or was not guilty of the commission of a felony, of which he admitted he had been convicted, would not have been competent, if offered, to bolster his testimony, a charge predicated upon the jury's belief of his innocence of the crime, was abstract and otherwise erroneous.
4. *Same; Trial; Remarks of Counsel.*—The solicitor said to the jury: "You can take that gun, which is in evidence and try the gun on the two shells in evidence, and put one shell in each barrel of the gun and snap it and see if it does not make the same impression on the caps of the two shells, and in the same place on the caps as is made on the caps of the two empty shells in ev-

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idence; and I invite you, gentlemen, to make the experiment when you retire to the room to make your verdict." Held, not error to refuse to exclude these remarks in view of the tendencies of the evidence.

APPEAL from Bibb Circuit Court.

Heard before HON. B. M. MILLER.

The defendant was indicted with Henry Duncan for the murder of Allen Fuller by shooting him with a gun. A severance was demanded by this defendant, and he was put upon his trial, convicted, and sentenced to the penitentiary for life. It was shown on the examination of witnesses by the state that when the defendants were arrested some 25 or 30 shells were found on them; that some were gun shells and some were rifle shells, some were buckshot shells and some were not; but the buckshot shells were marked "New Club Shells." It was also shown that two shots were fired at the time of the killing, and two empty shells were found near the place of the killing, marked and branded as above set out. These shells were offered in evidence over the objection of the defendant. Henry Duncan was introduced by the defendant, and on cross-examination the state was permitted over the objection of the defendant to ask him the following question: Were you not convicted of aiding prisoner to escape from jail, the said prisoner being charged with murder?" The witness answered: "Yes; was convicted and sentenced to Pratt Mines for aiding a prisoner to escape from jail, and the prisoner was charged with murder." The solicitor in his argument to the jury said: "You could take that gun which is in evidence, and try the gun on two of the shells in evidence, and put one shell in each barrel of the gun and snap it, and see if it did not make the same impression on the caps of the two shells, and in the same place on the caps, as is made on the caps of the two empty shells in evidence; and I invite you, gentlemen of the jury, to make the experiment when you retire to the room to make up your verdict." The defendant moved the court to exclude these remarks of the solicitor from the jury, but the court declined to do so. The defendant requested the following written charge, which was re-

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fused: "I charge you that if you believe, from all the evidence in this case, that Henry Duncan was not guilty of the charge of aiding a prisoner to escape from jail, then you should not consider the fact, as admitted by him, that he was convicted of the charge, in saying whether or not he testified willfully false in this case."

LOGAN & FULLER, for appellant.—No brief came to the reporter.

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

TYSON, J.—Under the testimony the shells were sufficiently identified as being those found near the place of the killing. They were, therefore, properly allowed in evidence as tending to show, in connection with other testimony adduced, that defendant fired them on the occasion of the homicide.

Section 4711 of the code of 1896 makes it a felony for any person to aid or attempt to aid any prisoner to escape from jail, confined therein under a charge or conviction of felony. Section 1795 provides that "no objection must be allowed to the competency of a witness because of his conviction for any crime except perjury, or subornation of perjury, but if he has been convicted of other infamous crime, the objection goes to his credibility." Under section 1796, proof of the conviction may be made by the oath of the witness without production of the record. At common law the conviction of a felony disqualified the witness, because the nature of the crime and the punishment rendered the witness infamous.—16 Am. & Eng. Ency. Law (2d Ed.) p. 245, et seq.; *Sylvester's Case*, 71 Ala. 17. It was a felony at common law for any one to aid the escape of a prisoner charged with felony, if he had knowledge of the crime upon which the prisoner was confined. Such assistance made the person rendering it an accessory after the fact.

The statute (section 4711 of the code) is violated without reference to the knowledge of the person who aids the prisoner to escape of the nature of the charge under

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which the prisoner is confined, or without respect to whether the escape is effectual or not.—*Wilson v. State*, 61 Ala. 15. So, then, the conviction of the common-law offense of aiding a prisoner to escape charged with a felony, with knowledge of the crime, being a felony, would under the rules of the common law disqualify the convicted person as a witness. And an objection to the competency of such a witness, if sustained by the trial court, would be sustained on appeal, unless the record repels the presumption that the conviction of the witness was for the common law offense.—*P. & M. Ins. Co. v. Tunstall*, 72 Ala. 142. But, aside from these considerations, we entertain the opinion that a conviction for a felony made so by statute, which was not a crime at common law, may be shown for the purpose of affecting his credibility as a witness under section 1795 of the code.—*Murphy v. State*, 108 Ala. 10, 18 South. 557; *Taylor v. State*, 62 Ala. 164, 165. This conclusion is not opposed to any of our cases. There are doubtless expressions in some of them which are calculated to mislead upon a mere cursory reading, but a careful examination of them will disclose that they support, rather than militate against, our conclusions. Their misleading tendencies grow out of a discussion of the nature of the act for which the conviction is had, with respect to whether that act was at common law of the nature of the *crimen falsi*. Where the conviction is for a felony, the question as to whether the act or offense is of the nature of the *crimen falsi* is wholly impertinent and unimportant. That question can only arise where the conviction is for a misdemeanor, and only becomes important in that class of cases.

Applying these principles to the exception reserved to the question propounded to defendant's witness, Henry Duncan, on cross-examination, it is apparent that there is no merit in it. There was no testimony introduced tending to show that this witness was not guilty of the charge on which he admitted he was convicted, and, indeed, such testimony could not have been legally admitted, if offered. For this reason, if for no other, the written charge requested by defendant was properly refused.

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There is no merit in the remaining exception to the ruling of the court with respect to the argument of the solicitor.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Murder.

(Decided June 14, 1906. 41 So. Rep. 460.)

1. *Homicide; Evidence; Sufficiency.* In a difficulty between defendant and deceased immediately before the killing, defendant secured deceased's pistol and shot him while he was retreating; Held, defendant was guilty of some degree of homicide.
2. *Criminal Law; Trial; Instruction; Misleading.*—There being other evidence from which the jury was authorized to return a verdict of guilt, a charge which asserts that if the testimony of a named witness, or any part thereof, was wilfully false, the jury could disregard it and find accused not guilty, was misleading and properly refused.
3. *Same; Argumentative Instructions.*—An instruction directing the jury that they may look to the fact that the pistol used in killing deceased was deceased's pistol and not defendant's in fixing the grade of the homicide, was properly refused as being argumentative.
4. *Same; Instruction as to Duty of Jurors; Reasonable Doubt.*—A charge requiring an acquittal if either or any one of the jury have a reasonable doubt of the defendant's guilt, is erroneous as requiring a verdict upon the belief of one juror.
5. *Homicide; Instructions; Self-Defense; Omission of Evidence.*—A charge requiring an acquittal if the jury believe that at the time the fatal shot was fired defendant acted upon the honest belief that he was in danger of life or great bodily harm at the hands of the deceased, was properly refused as omitting all reference to defendant's freedom from fault in bringing on the difficulty.

APPEAL from Covington Circuit Court.
Heard before HON. H. A. PEARCE.

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The evidence tended to show that defendant was at a well drawing water in the rear of Gordon Bros.' store, in Covington county, and deceased was on a wagon near the rear of said store. Defendant's wife came up to where deceased was, and asked him why he had cursed her child, whereupon he cursed her and told her he would slap her head off. Defendant asked him not to curse his wife, and deceased inquired of him, using an oath, what he had to do with it. Deceased was drinking. Defendant replied that he did not want deceased to be cursing his wife, and approached deceased, whereupon deceased drew a pistol. Defendant closed with deceased in a struggle over the pistol, wrenched the pistol out of deceased's hand, and, as deceased was stepping off sideways, asking defendant not to shoot, the defendant fired three shots in rapid succession, two of them taking effect in deceased's left side and producing death. There was conflict in the testimony as to whether or not deceased was advancing on defendant when the first shot was fired. The defendant requested the court in writing to give the following charges, each of which the court separately refused: "(1a) If the guilt of the defendant is dependent on the testimony of Isaac Terry, and the jury believe from the evidence that the testimony of said Terry, or any part thereof, was willfully and maliciously false, then they can disregard his testimony in full, and must find the defendant not guilty." "(11) You may look to the fact, if you find it to be a fact from the evidence in the case, that the pistol used in killing the deceased was his own weapon, and not the pistol of the defendant, when you are fixing the grade of the homicide, if you should determine that the defendant was not absolutely guiltless." "(A) I charge you that if you believe from the evidence that at the time the fatal shot was fired the defendant acted under the honest belief that he was in danger of life or limb at the hands of deceased, then you should acquit him. (B) I charge you that, if you believe from the evidence that at the time the fatal shot was fired the appearances and surroundings were such as to generate in the mind of the defendant the honest belief that he was in danger of life

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or limb at the hands of the deceased, then you should acquit him. (C) I charge you that, if the defendant had a reasonable apprehension of great personal violence either to life or limb, he had a right to protect himself, even if, in order to do so, it necessitated the taking of the life of the deceased. (D) I charge you that, if you believe the evidence, you cannot convict the defendant of murder in the first degree. (E) I charge you that, if you believe the evidence, you cannot convict the defendant of murder in the second degree. (F) I charge you that, if you believe from the evidence that the defendant at the time of the fatal difficulty honestly believed from appearances and surroundings that the danger to his life or limb would have been increased had he retreated, then he was under no duty to retreat. (G) I charge you that, if you believe the evidence, you cannot convict the defendant. (H) I charge you that, if either of you have a reasonable doubt as to the defendant's guilt, then it will be your duty to acquit him. (I) I charge you that, if either or any of you are not satisfied to a moral certainty of defendant's guilt, then you should acquit him."

R. H. JONES and W. N. ALBRIGHTON, for appellant.—The court erred in refusing charge 1A.—*Jackson v. The State*, 136 Ala. 22; *Churchwell v. The State*, 117 Ala. 124; *Burton v. The State*, 115 Ala. 1. Charge 11 should have been given.—*Sylvester v. The State*, 72 Ala. 201; *Compton v. The State*, 110 Ala. 24. Charge E should have been given.—71 Ala. 14; 86 Ala. 613.

MASSEY WILSON, Attorney General, for the State.—No brief came to the reporter.

TYSON, J.—The defendant's conviction was not dependent upon the testimony of witness Terry. Indeed, under the testimony adduced through other witnesses, who saw the shooting, the jury might well have found the defendant guilty. If it be true that defendant shot deceased while he was running, after getting possession of his pistol, no matter who was at fault in bringing on the difficulty in which the pistol was wrenched by defendant from the hands of the deceased, he could not be

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guiltless. It was with respect as to what occurred between deceased and defendant prior to the scuffle between them over the pistol that Terry's testimony was uncorroborated. Charge 1A, we think, was calculated to mislead the jury, if not otherwise bad. It is true that in *Jackson v. State*, 136 Ala. 22, 34 South. 188, we held that a charge, similar to this one in all respects except in that one, the willful and malicious falsity of the witness' testimony was predicated upon a material part of his testimony and should have been given. But in that case the conviction was dependent solely upon the witness' testimony with which the charge dealt.

Charge 11 was an argument.—*Mathews v. State*, 100 Ala. 46, 14 South. 359, and cases there cited.

Charges A, B, C, and F were faulty, if not otherwise bad in omitting the proper postulation as to defendant's freedom from fault in bringing on the difficulty.

The defendant's guilt, as charged, under the evidence, was clearly for the determination of the jury. Charges D, E, and G were therefore properly refused.

Charges I and J made defendant's acquittal turn upon the finding of one juror.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Murder.

(Decided June 14, 1906. 41 So. Rep. 847.)

1. *Witness; Children; Competency.*—Although a child twelve years of age testified that she did not understand the question, whether she knew the nature of a judicial oath, yet, by other answers showed sufficient knowledge of the obligation of an oath, she was properly allowed to testify.

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2. *Homicide; Instructions.*—In a prosecution for homicide where the only defense was a denial of the killing and the evidence made the offense murder or nothing, a charge that if the jury had a reasonable doubt as to whether the killing was done deliberately or premeditatedly, they could not find the defendant guilty of murder in the first degree, and if they had a reasonable doubt as to whether it was done in malice, then they could not find the defendant guilty of murder in either degree, but only of manslaughter, was properly refused.
3. *Criminal Law; Plea of Insanity; Time.*—A plea of insanity not interposed at the time of arraignment and not offered until after the jury had been empanelled, when not accompanied by a statement concerning the proof expected to be offered in support of it, may be properly stricken by the trial court without an abuse of discretion, although it is made to appear that at the time of arraignment defendant's attorneys were strangers to him and had no means of ascertaining that such plea should be filed.
4. *Same; Affirmative Charge; Denial.*—It is always proper to refuse to defendant the general charge where there is evidence sufficient to warrant a conviction.
5. *Same; Instruction; Circumstantial Evidence.*—The evidence not being entirely circumstantial, an instruction was properly refused which asserted that in order to warrant a conviction on circumstantial evidence, the circumstances must be so multiplied as to increase the probability of defendant's guilt to a definite extent beyond the reach of mere calculation.
6. *Same.*—An instruction that unless the jury, after carefully weighing all the evidence, cannot feel an abiding conviction of defendant's guilt, they must acquit, was properly refused.
7. *Same; Reasonable Doubt.*—An instruction requiring an acquittal unless the jury believed beyond "all doubt" that the defendant was guilty requires a too high degree of proof, and is properly refused.
8. *Same; Weight of Evidence.*—A charge which asserts that defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of his innocence, is misleading as tending to require a belief on the part of the jury that the evidence of guilt must be conclusive. (TYSON and SIMPSON, JJ., dissent.)
9. *Same; Charges Argumentative.*—Charges which are mere arguments are always properly refused.
10. *Same; Instruction; Reasonable Doubt.*—A charge which asserts that if the evidence did not establish the truth of the charge to a moral certainty and beyond a reasonable doubt, that is, to a

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certainty that convinced and directed the jury's understanding and satisfied their reason and judgment, they must acquit, required a too high degree of proof.

11. *Same; Presumption of Innocence.*—Presumption of innocence being a conclusion of law, having no relation to the condition of mind produced by proof, an instruction was properly refused which asserted that, if after examining and weighing all of the evidence carefully a presumption of innocence in favor of accused was left in the minds of the jury, they should acquit defendant.
12. *Same; Circumstantial Evidence.*—A charge asserting that circumstantial evidence is wholly inferior in cogency, force and effect to direct evidence, is properly refused.
13. *Same.*—An instruction is misleading and properly refused which asserts that the evidence in the case should be almost as clear and convincing as direct evidence, in order to justify a conviction, where there was direct evidence in the case.
14. *Same; Witnesses; Weight of Testimony.*—A charge asserting that the jury should be very cautious and careful in weighing the testimony of a named witness is invasive of the province of the jury and properly refused.
15. *Same; Instruction; Ignoring Evidence; Degrees of Homicide.*—Where the evidence in the case would justify a conviction of murder in the first degree, a charge asserting that the defendant could be convicted of no higher degree than murder in the second degree was properly refused.

APPEAL from Macon Circuit Court.

Heard before HON. H. P. MERRITT, Special Judge.

The indictment in this case charges defendant with killing Frank Fort by striking him with an instrument to the grand jury unknown, and the second count charges the killing by means unknown to the grand jury. The indictment was preferred by Hon. S. L. Brewer, who was solicitor of the circuit, and the cause was called for trial after his election as judge of the circuit, and H. P. Merritt was agreed upon as special judge to try the cause. The facts necessary to an understanding of the opinion sufficiently appear therein. The evidence tended to show that the defendant killed a baby, Frank Fort by name, by picking it up off the bed by one leg and throwing it violently to the floor, breaking and crushing a leg, arm, ribs, and head.

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At the conclusion of the evidence the defendant requested the following written charges, which were refused: (1) General affirmative charge. (4) "To warrant the jury in convicting this defendant upon circumstantial evidence, the circumstances must be so multiplied as to increase the probability of his guilt to an indefinite extent beyond the reach of mere calculation. The evidence must convince the jury of defendant's guilt beyond a reasonable doubt." (6) If upon the whole evidence the guilt of the defendant is not established to a moral certainty, the jury must find the defendant not guilty." (9) "I charge you, gentlemen, that unless after carefully weighing all the evidence, you cannot feel an abiding conviction of the defendant's guilt, you must find defendant not guilty." (14) "I charge you, gentlemen, that unless the evidence convinces you beyond all doubt to a moral certainty, and is strong and cogent, you must acquit the defendant." (15) "I charge you that the defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of his innocence." (18) "I charge you, gentlemen, that if you have a reasonable doubt as to whether the killing was done deliberately or premeditatedly, then you cannot find the defendant guilty of murder in the first degree; and if you have a reasonable doubt as to whether the killing was done in malice, then you cannot find the defendant guilty of murder in either degree, but only of manslaughter at most; and if, after considering all the evidence, you have a reasonable doubt as to defendant's guilt of manslaughter arising out of all the evidence, then you should find the defendant guilty of no offense." (19) "I charge you, gentlemen, that you cannot convict the defendant on circumstantial evidence, when it is inconsistent with any reasonable theory of innocence, unless you are so convinced by it that each of you would be willing to act on the decision in matters of the highest importance to yourselves. (20) "If you do not find that the evidence in this case establishes the truth of the charge in the indictment beyond a reasonable doubt and to a moral certainty, a certainty that convinces and directs your understanding

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and satisfies your reason and judgment, you must acquit the defendant." (21) "If, after examining and weighing carefully all the evidence, there is left in your minds a presumption of innocence in favor of the accused, you must find the defendant not guilty." (22) "I charge you, gentlemen, that circumstantial evidence is wholly inferior in cogency, force, and effect to direct evidence, and that you must feel, after examining and weighing all the evidence, an abiding conviction of the guilt of the defendant; otherwise, you must acquit him." (A) "I charge you, gentlemen, that you must be very cautious and careful in the weight and credence you give to the testimony of the child Susie Fort." (C) "I charge you, gentlemen, that under the evidence the highest degree of murder you can find against the defendant is murder in the second degree." (D) "I charge you, gentlemen, that the evidence in this case should be almost as clear and convincing as direct evidence, or you must acquit the defendant."

WILLIAM P. COBB, for appellant.—The child Susie Fort was incompetent as a witness.—*McKelton v. State*, 88 Ala. 181.

Charge 9 should have been given.—*Owen v. State*, 52 Ala. 400; *Mose v. State*, 36 Ala. 211; *Coleman v. State*, 59 Ala. 52; *Tatum v. State*, 63 Ala. 152; *Commonwealth v. Webster*, 5 Cush. 320.

Charge 15 should have been given.—*Bones v. State*, 117 Ala. 138; and authorities *supra*.

Charge 18 should have been given.—*Adams v. State*, 133 Ala. 166; *Thompson v. State*, 110 Ala. 34; *Stoneking v. State*, 118 Ala. 70.

The refusal of the court to give charge 19 was error.—*Burton v. State*, 107 Ala. 109; *Pickens v. State*, 115 Ala. 142. Charge 20 states a correct proposition of law.—*Commonwealth v. Webster*, *supra*.

Charge 21 should have been given.—*Bryant v. State*, 116 Ala. 145.

MASSEY WILSON, Attorney General, for State.—It was within the irrevisable discretion of the court to refuse

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to allow the filing of the plea of insanity.—§ 4939, code 1896; *Morrell v. State*, 136 Ala. 44.

The witness Fort was entirely competent.—*Kelly v. State*, 75 Ala. 21; *Walker v. State*, 134 Ala. 86. Charge four is confusing. Charge 6 uses the word "gult," and its refusal on that account was without error.—*McWhorter v. Bluthenthal*, 136 Ala. 568; *Little v. State*, 89 Ala. 99; *Smith v. State*, 141 Ala. 59; *Banks v. State*, 39 So. Rep. 921. Charge 9 was properly refused.—*Adams v. State*, 115 Ala. 90. Charge 15 was bad.—*Griffith v. State*, 90 Ala. 588; *Welch v. State*, 96 Ala. 92.

SIMPSON, J.—The defendant in this case was convicted of the crime of murder in the first degree and the punishment fixed at death.

The first insistence of the defendant is that the court erred in striking from the files, on motion of the solicitor, the defendant's plea of "not guilty, by reason of insanity." It appears that when the defendant was arraigned he had no attorney, and the court appointed two members of the bar to defend him, and the plea of "not guilty" was interposed. When the day for trial arrived, after the jury had been empaneled, the indictment read, and the defendant pleaded, "as he had pleaded before, not guilty," counsel for the defendant asked leave of the court to file the special plea of "not guilty, by reason of insanity," and the court refused to allow the same. This is the statement in the record, but in the bill of exceptions it is stated that, "after the indictment was read to the jury, the defendant's counsel asked leave to file said plea, which plea was duly filed as shown by the record in this case," and that the solicitor then filed a motion (which is set out) to strike said plea from the file, the grounds being, first, "because said special plea was not filed at the time of arraignment of defendant," and, second, "because said special plea was not filed until the special jury was sworn and impaneled and the indictment had been read to the jury," which motion was sustained. The only statement made to the court by the attorneys for the defendant was that at the time of the arraignment the attorneys were entire strangers to the de-

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fendant and had no means of ascertaining that said special plea should be interposed. Nothing was said about whether anything could be proved along that line. The statute requires this plea to be filed at the time of arraignment. We cannot say that in this case there was such an abuse of the discretion which rested in the court to allow such a plea at a subsequent stage of the action as to call for a reversal.—Code 1896, § 4939; *Morrell v. State*, 136 Ala. 44, 34 South. 208.

The court properly allowed the witness Susie Fort to testify. She was 12 years old, and showed sufficient knowledge of the obligation of an oath to testify. This she showed by her other answers, notwithstanding she did not understand the question when put in the shape of asking her if she “knew the nature of a judicial oath.”

As to her being young when the occurrence took place, and as to the memory of them, these were matters which went merely to the weight of her testimony.—*Kelly v. State*, 75 Ala. 21, 51 Am. Rep. 422; *Walker v. State*, 134 Ala. 86, 32 South. 703.

There was no error in the refusal to give charge 1 (the general charge) on request of the defendant, as there was evidence sufficient to warrant a verdict of guilty.

As to the refusal to give charge 4, it is sufficient to justify the refusal that the evidence in this case was not entirely circumstantial, and the charge was misleading.

Without noticing the elliptical nature of charge 6, requested by the defendant, it was substantially covered by charges 5, 7, 10 1-2 and 11, given on request of defendant.

There was no error in the refusal to give charge 9, requested by the defendant. The charge expresses the opposite of what was doubtless intended. Of course, it cannot be said that unless the jury cannot feel an abiding conviction, they should find the defendant not guilty. That would be predicated a conviction on the jury not having the abiding conviction of guilt. The “unless” should have been “if,” or the “not” left out.

Charge 14, requested by the defendant, was properly refused, as it uses the expression “all doubt” in place of “a reasonable doubt.”

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Charge 15 was calculated to mislead the jury to believe that the evidence of his guilt had to be conclusive, and this would exact too high a degree of proof.—*Griffith v. State*, 90 Ala. 583, 8 South. 812; *Bones v. State*, 117 Ala. 138, 23 South. 138.

Charge 18, besides being elliptical, was properly refused, as the killing in this case was either murder or nothing; the only defense being a denial that the defendant killed the child.—*Hunt v. State*, 135 Ala. 1, 8, 9, 33 South. 320.

Charge 19 was properly refused.—*Rogers v. State*, 117 Ala. 9, 13, 15, 22 South. 666; *Amos v. State*, 123 Ala. 50, 54, 26 South. 524; *Nevill v. State*, 133 Ala. 99, 105, 32 South. 596.

Charge 20 was properly refused. This charge is in accordance with the views expressed by the Massachusetts Supreme Court, in explaining the nature of a reasonable doubt; but under our decisions it requires too high a degree of proof.—*Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 320, 52 Am. Dec. 711; *Griffith v. State*, 90 Ala. 583, 588, 8 South. 812.

Charge 21 was properly refused. A presumption is a conclusion drawn by the law, and has no relation to the condition of mind produced by proof.—23 Am. & Eng. Ency. Law, p. 967.

Charge 22 was properly refused. It is not the law that circumstantial evidence "is wholly inferior in cogency, force, and effect to direct evidence."—*Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415; *Bland v. State*, 75 Ala. 574; *Thornton v. State*, 113 Ala. 43, 21 South. 356 59 Am. St. Rep. 97.

Charge D was also properly refused, as there is no authority for drawing such distinctions between circumstantial and direct evidence. Besides, it was misleading, as as there was direct evidence in this case. Authorities supra.

Charge A was properly refused. The court was not called upon to make such an invidious distinction as to this witness. It was for the jury to say what weight her testimony was entitled for.

Charge C was properly refused. There was evidence

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which justified the jury in finding the defendant guilty of murder in the first degree.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

ON REHEARING.

PER CURIAM. On rehearing Justices TYSON and SIMPSON are of opinion that charge 15, requested by the defendant, should have been given; but the majority of the court adhere to the original opinion, on the ground that the jury may have been "misled by it into an erroneous conclusion."—*Bay Shore R. R. v. Harris*, 67 Ala. 6, 9; *Gilmore v. State*, 99 Ala. 154, 157, 160, 13 South. 536; *Adams v. State*, 115 Ala. 90, 91, 22 South. 612, 67 Am. St. Rep. 17; *Bodine v. State*, 129 Ala. 107, 112, 29 South. 296.

Motion for rehearing overruled.

WEAKLEY, C. J., and HARALSON, DOWDELL, ANDERSON, and DENSON, JJ., concur. TYSON and SIMPSON, JJ., dissent.

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Murder.

(Decided May 31, 1906. 41 So. Rep. 727.)

1. *Homicide; Evidence.*—From the time defendant appeared upon the scene of the killing, until the killing occurred, all the occurrences and conversations participated in by defendant were competent as evidence, which were shown to be parts of a continuous transaction, occurring within a brief space of time.
2. *Criminal Law; Conduct of Accused at Time of Arrest.*—Under the rule that the conduct and demeanor of a defendant at the time of his arrest are admissible against him, it is competent to show that at the time defendant was arrested he threw his hands behind him and drew a pistol.

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3. *Same; Evidence.*—It was improper to permit the state to show that a witness examined by it was summoned by the defendant, as the only purpose for so doing was to prejudice the jury against defendant.
4. *Same; Remarks of Counsel.*—It was improper not to exclude remarks of the solicitor that defendant had killed deceased and left his three orphan children to charity or his friends, in the absence of such evidence.
5. *Same; Motive; Reasonable Doubt.*—A charge which asserts that if the state had failed to show a motive on defendant's part to commit the offense, and his guilt was not clearly proven, then the absence of a motive, considered in connection with all the evidence in the case, might generate in the minds of the jury a reasonable doubt of defendant's guilt, was erroneous and properly refused.
6. *Same; Argumentative Instructions.*—A charge asserting that there was no evidence in the case that defendant did or said anything at a certain house near which the killing occurred that would have justified the deceased in striking defendant, was properly refused as argumentative.
7. *Homicide; Malevolent Spirit; Common Purpose; Evidence.*—Evidence that an hour or an hour and a half before the killing, while with another, defendant said that he was going over to a certain house near which the killing occurred and at which a dance was being had, and would dance or break it up, in connection with other evidence, was competent as showing a malevolent spirit on part of defendant, and as tending to show a common purpose on the part of defendant and a co-defendant to go to the house from an unlawful motive.
8. *Same; Preparation for Act.*—It was competent to show that half an hour before the homicide defendant borrowed a pistol as tending to show preparation.
9. *Same.*—It was competent to show that about the time of the difficulty a witness heard shots; that soon thereafter two men came running by from the direction of the scene of the homicide, that he heard one say "Wait F. J., I have killed one damned scoundrel, and I will kill another if he runs up on me;" that the one who spoke had a pistol in his hand; and that defendant's codefendant, Bedsole, was commonly called F. J."
10. *Same; Self Defense; Instructions.*—An instruction which asserts that if defendant was at fault in bringing on the difficulty, yet if he withdrew from it in good faith and was departing when deceased walked up to him and either pushed or knocked him down, and got down on him, and it appeared to defendant that he was in danger of great bodily harm, and he could not have

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retreated, defendant had the right to shoot deceased, was erroneous and properly refused; So, also, was an instruction asserting that if the jury believed that defendant had had no difficulty with deceased, and nothing was said or done by defendant to deceased, and deceased came up to him and shoved or knocked him down, and defendant could not have retreated, and it appeared to defendant that he was in great danger of bodily harm from deceased, then defendant had the right to shoot.

11. *Witnesses; Impeaching Testimony; Showing Ill-will on Part of Witness.*—One of the defendant's witnesses having testified that he was a special friend of the deceased, it was proper to permit the solicitor to ask the witness if he had not been indicted in E. county for selling whiskey without license and requested the deceased to act as a witness for him, whereupon deceased replied that he would tell the truth to the disadvantage of witness, and that since that time witness had been angry with deceased.
12. *Same; Character for Truth and Veracity.*—A witness cannot be asked as to his own character for truth and veracity.
13. *Same; Scope of Redirect Examination.*—A witness for the state was asked, on cross examination, if he had ever had any trouble with defendant, and answered, "yes, in this way." On redirect examination the state had the right to show the nature of the difficulty without going into the details.

APPEAL from Montgomery City Court.

Heard before HON. W. H. THOMAS.

J. D. Glass was convicted of murder, and appeals. Nearly all the facts necessary to a proper understanding of the case appear in the opinion. The witness Knight was permitted to testify over the objection of the defendant that he saw the defendant and Bedsole about an hour and a half before the difficulty over at the new mill, and that Glass said in Bedsole's presence that they were going over to Milner's house and dance, or break it up. The witness Penler was allowed to testify that he heard the shots, and soon thereafter two boys came running by his house from the direction of Milner's, he living about three doors below Milner, when he heard the one behind say, "Wait, F. J.; I've killed one damn scoundrel, and I'll kill another if he runs up on me;" that the one behind and the one who called to "F. J." had a pistol in his hand. The witness was further permitted to testify that Bedsole was commonly called "F. J." The solicitor asked

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the witness Carden, "Is it not a fact that you were indicted in Elmore county for selling whisky, and asked Mr. Rutherford to be a witness for you, and he said that he would tell the truth, and it would hurt, and you got mad with him about it and have been mad with him ever since?" Mr. Rutherford was the man alleged to have been killed. Objection to this question was overruled. The defendant inquired of witness Law on cross-examination, "Do you think you know your general character in the community in which you live?" "Is your character good or bad in the community in which you live?" The court sustained the solicitor's objection to these questions.

The defendant requested the court to give the following charges, which were refused: "(4) If the defendant J. D. Glass was at fault in bringing on the difficulty, but withdrew from it in good faith and was departing, and the deceased came out of the witness Milner's house, walked up to the defendant Glass, and pushed or knocked him down, and got down on him, and it appeared to the defendant Glass that he was in danger of great bodily harm, and the defendant Glass could not have retreated, he had the right to shoot the deceased. (5) There is no evidence in this case that the defendant Glass did or said anything in Milner's house that would have justified the deceased, Rutherford, in striking him. * * * (11) If the jury believe from the evidence that the state has failed to show any motive on part of defendant Glass to commit the offense charged, and his guilt is not clearly proven, then this absence of motive may, when considered in connection with all the evidence in the case, generate in the minds of the jury a reasonable doubt of the guilt of the defendant Glass. * * * (28) If the jury believe from the evidence that the defendant Glass had had no difficulty with the deceased, and the defendant Glass was standing in the field opposite Milner's house, and went towards the deceased, and nothing was said or done by defendant Glass to the deceased, and the deceased shoved or knocked Glass down, and Glass could not have retreated, and it appeared to him that he was in danger of receiving great bodily harm from deceased, then he had the right to shoot."

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HILL, HILL & WHITING, for appellant.—Appellant's objections to the questions asked the witnesses, Millner and Avant, should have been sustained.—*Horn v. The State*, 101 Ala. 144. Appellant's objection to the question asked Carden should have been sustained.—*O'Neal v. Curry*, 134 Ala. 216. The court erred in sustaining the objection to the question to the witness, Law.—*White v. The State*, 114 Ala. 10; *Ross v. The State*, 139 Ala. 144. The court erred in overruling defendant's objection to the question asked Kirby.—*Neilson v. The State*, 40 So. Rep. 222. The argument of the solicitor was improper.—*Lane v. The State*, 5 Ala. 11; *Coleman v. The State*, 87 Ala. 14; *Wolff v. Minnis*, 74 Ala. 386; *Anderson v. The State*, 104 Ala. 83; *Cross v. The State*, 68 Ala. 476; *Neilson v. The State*, *supra*. Charges 28 and 4 should have been given. Charge 11 should have been given.—*Clifton v. The State*, 73 Ala. 473.

MASSEY WILSON, Attorney General, for the State.—No brief came to the reporter .

DENSON, J.—The appellant, J. D. Glass, was jointly indicted and tried with one Frank Bedsole for the murder of Marshall Rutherford. The trial resulted in the acquittal of Bedsole and the conviction of Glass of murder in the second degree. From the judgment of conviction, Glass has appealed.

The killing was done by Glass with a pistol on the first night in May, 1905, in the city of Montgomery, on what is known as "Factory Row" and across the road from the house of James Milner. There was a dance in progress at Milner's house, and several persons were gathered there. Among them were the deceased and his three little girls. Besides there were a number of ladies in the house. All the occurrences and conversations of the evening from the time defendant Glass appeared at James Milner's house, until the killing of the deceased, and in which defendant Glass participated, were shown to be but parts of a continuous transaction, occurring within a brief space of time, and there was no error in permitting the state's witness James Milner to testify to them.—*Armor's*

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Case, 63 Ala. 173; *Stitt's Case*, 91 Ala. 10, 8 South. 669, 24 Am. St. Rep. 853; *Jordan's Case*, 81 Ala. 20, 1 South. 577, s. c. 79 Ala. 9; *Churchwell's Case*, 117 Ala. 126, 23 South. 72.

The defendant Glass was arrested several hours after the shooting by Policeman Avant, assisted by Policeman McDade. The fact that defendant threw his hands behind him and drew his pistol at the time of the arrest was properly allowed to be proved. The conduct and demeanor of defendant at the time of his arrest are competent evidence against him.—*Henry's Case*, 107 Ala. 22, 19 South. 23; *Bowle's Case*, 58 Ala. 335.

The declaration made by defendant Glass about an hour or an hour and a half before the killing, while he and defendant Bedsole were together, when taken in connection with the other evidence, was properly admitted as tending to show a malevolent purpose on the part of him and Bedsole to go to the dance for an unlawful purpose. Witness McHugh was permitted to testify that at McNeil's store, about a half hour before the shooting he saw defendant Glass whisper to one Redmond, and that immediately Redmond pulled his pistol out and gave it to Glass. This evidence was properly admitted. It tended to show preparation on the part of Glass.—*Ford's Case*, 71 Ala. 385; *Finch's Case*, 81 Ala. 41, 1 South. 565.

The motion to exclude the evidence of the witness Penler is so patently without merit as to require no discussion.—*Henry's Case*, 107 Ala. 22, 19 South. 23.

Defendant's witness Carden having testified that he was a special friend of the deceased, the state was properly allowed, against the objections made, to ask the question that was objected to. This question was asked for the purpose of showing enmity on the part of the witness, and thus to contradict his claim of special friendship. This is always allowable.—*McHugh's Case*, 31 Ala. 317; *Haralson's Case*, 82 Ala. 47, 2 South. 765; *Yarbrough's Case*, 71 Ala. 376; *Burke's Case*, 71 Ala. 377.

The witness cannot be interrogated with respect to his own general character for truth and veracity; and the court committed no error in its rulings on questions propounded on cross-examination by defendant to the witness Law.

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State's witness McSwain was asked on cross-examination this question: "Did you ever have any trouble with him (defendant)?" The witness answered, "Yes, in this way." The bill of exceptions recites that counsel for defendant refused to let the witness state what the trouble was. The solicitor then asked the witness this question: "Explain what the trouble was." It may be that illegal evidence would have been responsive to the question, and the court cannot be put in error for sustaining an objection to such a question.—*Ross' Case*, 139 Ala. 144, 36 South. 718. But when the question also calls for evidence which would be competent, and the court overrules an objection to it, the court will not be put in error for the ruling, and if illegal evidence is embraced in the answer the remedy is by motion to exclude. It is apparent that the state had the right to show whether the trouble was a fight, a personal difficulty, or other kind of trouble, without going into details.—*Jones' Case*, 76 Ala. 8. There was no motion to exclude, and we need not consider the answer to the question.

That Mrs. Kirby had been summoned as a witness in behalf of the defendant was immaterial, and the solicitor was improperly allowed to show that fact by her. As has been recently said by us, the only possible purpose of such a question and its answer was to prejudice the jury against the defendant.—*Neilson's Case*, (Ala.) 40 South p. 221.

The record contains no evidence that the deceased's three children were left to charity or his friends, and yet the solicitor stated in his argument to the jury: "The defendant has taken the life of Rutherford, and left his three orphan children to charity and to his friends." This cannot be considered as a mere inference, but is the statement of a fact, and the court should have excluded that part of the statement embraced in defendant's motion.—*Neilson's Case*, *supra*; *Wolff v. Minnis*, 74 Ala. 386; *Davis v. Common Council of Alexander City*, 137 Ala. 206, 33 South. 863.

Charges 28 and 4, requested by the defendant, were properly refused.—*McClellan's Case*, 140 Ala. 99, 37 South. 93:

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Charge 11 was properly refused.—*Jackson's Case*, 136 Ala. 22, 34 South. 188; *Hornsby's Case*, 94 Ala. 55, 10 South. 522; *Griffith's Case*, 90 Ala. 583, 8 South. 812.

Charge 5 was argumentative, and was properly refused.

The affirmative charge requested by defendant is absolutely without merit.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

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Murder.

(Decided June 20, 1906. 42 So. Rep. 1.)

1. *Criminal Law; Appeal; Record.*—The record not showing the difference between the copy of the indictment served upon the defendant, and the true indictment, defendant's objection to being put upon trial on the grounds that no true copy of the indictment had been served on him, cannot be reviewed, on appeal.
2. *Same.*—The record failing to show what answer was expected to a question to which an objection was sustained, such ruling cannot be reviewed, upon appeal.
3. *Same; Appeal; Harmless Error; Objection to Question.*—Where the answer to the question was contained in the subsequent testimony of the witness, it was harmless error to sustain an objection to the question when asked.
4. *Same; Review; Rulings on Evidence.*—It not plainly appearing from the question that evidence sought to be elicited by it was relevant and material, in order to have a review of the sustaining of objection to the question, it should appear of record what answer was expected.
5. *Same; Harmless Error; Form of Question.*—A witness having stated in detail what defendant said, without objection, any-

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thing objectionable in the form of a question about threats made by defendant against deceased was harmless error.

6. *Same; Evidence; Opinion.*—It is objectionable as calling for an opinion, to ask whether deceased was afraid to go about alone at night.
7. *Same; Evidence; Hypothetical Questions.*—Where the question was not confined to the pool of water testified about, and the conditions of the indefinite pool were not shown to be the same as the pool in testimony, a hypothetical question as to a pool of water becoming colored is objectionable.
8. *Witnesses; Examination; General Questions.*—A question, referring to a time a week before the alleged homicide, "what did defendant say to deceased when he left her that morning," being so general that irrelevant evidence would be responsive to it, was objectionable.
9. *Same; Credibility; Materiality of Evidence.*—It being shown without dispute that a witness was in the employ of the railroad company near whose tracks the body was found, it was immaterial, as affecting his credibility on account of bias or interest, whether he voluntarily ascertained the facts as to the appearance of the body about which he testified, or whether he ascertained them as part of his duty as a railroad employee to get up evidence where a body was found on or near the track.
10. *Witnesses; Credibility; Evidence.*—The fact that a witness who testified to threats made by defendant against deceased, was a member of the coroner's jury which investigated the case, and said nothing about his knowledge of such threats while on the jury, although the jury was charged to look up all the evidence bearing on the case, was not additional circumstance of a discrediting nature to the evidence allowed to be introduced that he knew of such threats while a member of such jury and said nothing about it, was immaterial and properly disallowed.
11. *Homicide; Malice; Evidence.*—For the purpose of showing a disposition on part of defendant to harm deceased, and also to show malice, it was competent to permit testimony that about a week before the homicide defendant said that if deceased did not quit following him around he was going to kill her.
12. *Same; Threats; Proof of Corpus Delicti.*—If there is sufficient evidence of the corpus delicti to require a submission of that question to the determination of the jury, threats made by defendant against deceased become admissible.
13. *Same; Evidence; Instructions at Inquest.*—On a trial for murder instructions given the jury at the inquest are immaterial and not admissible.
14. *Same; Degrees; Instructions.*—It is the duty of the court, under § 4857, Code 1896, to instruct the jury with respect to the de-

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grees of murder, and it is not error for the court to do so on the ground that, under the evidence, the defendant was guilty of murder in the first degree, or nothing.

15. *Same; Means of Killing; Instructions.*—Where one count of the indictment alleged that the means by which the murder was committed was unknown to the grand jury, a charge that if the jury believed from the evidence beyond a reasonable doubt that deceased came to her death at the hands of the defendant, it does not matter what sort of weapon she was killed with, or how it was used, defendant would be guilty under the count, was proper.
16. *Criminal Law; Instructions; Reasonable Doubt.*—Charges that if the jury believe from the evidence beyond a reasonable doubt that defendant is guilty; though they also believe it is possible he may not be guilty, they must convict; and that the doubt to warrant an acquittal must be actual and substantial, not a mere possible doubt, are correct and properly given.
17. *Same.*—When a charge is correct in stating that "beyond a reasonable doubt" does not mean absolute certainty, it is not rendered so erroneous as to work a reversal, by the added assertion that there is no such thing in human affairs as absolute certainty.
18. *Same.*—A charge asserting that if the jury are reasonably doubtful as to the proof of any material allegation in the indictment they must acquit, is erroneous and properly refused.
19. *Same.*—A charge asserting that if, after considering all the evidence, the jury have a fixed conviction of the truth of the charge, that they are satisfied beyond a reasonable doubt, and it is their duty to convict, is correct.
20. *Same; Instructions; Alibi.*—A charge asserting that where a defendant attempts to prove an alibi the burden is on him to successfully prove it, is a correct statement of law.
21. *Same; Instructions; Disregarding Defendant's Testimony.*—An instruction is proper that asserts that if the jury believe from the evidence that defendant has wilfully sworn falsely as to any material matter, they may, in their discretion, disregard all of his testimony.
22. *Same; Repetition of Instructions.*—Where a proposition has been clearly stated in a written charge given, it is not error to refuse charges which are substantial duplicates thereof.
23. *Same; Instructions; Degree of Proof.*—A charge asserting that there should not be a conviction unless, to a moral certainty, the evidence excludes every other reasonable hypothesis than that of guilt of defendant, and no matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of defend-

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ant is not shown by that full measure of proof that the law requires, is erroneous as requiring a too high degree of proof.

24. *Same; Instructions; Circumstantial Evidence.*—A charge asserting that one accused of crime should not be convicted on circumstantial evidence, unless such evidence shows, by a full measure of proof, beyond a reasonable doubt, that defendant is guilty, and such proof is always insufficient unless it excludes to a moral certainty every reasonable supposition or hypothesis arising out of all the evidence, but that of defendant's guilt; and no matter how strong the circumstances if they can be reconciled by any theory, generated by all the evidence that some one else may have committed the crime, then defendant is not shown to be guilty by that full measure of proof that the law demands, requires a too high degree of proof, and is properly refused.
25. *Same; Instructions; Invading Province of jury.*—Charges asserting that there is not sufficient evidence of certain facts, and that there is no evidence before the jury that deceased was murdered, was properly refused as invasive of the province of the jury.
26. *Same; Incomplete and Misleading Instructions.*—A charge asserting that before the jury are authorized to convict, the hypothesis should follow naturally from the evidence, and be consistent with all of it, being incomplete and misleading in that it is not stated what hypothesis is referred to, was erroneous and properly refused.
27. *Same; Instructions; Degree of Proof.*—A charge asserting that before defendant can be convicted the evidence should be as strong as the positive testimony of one credible witness, who proves beyond all reasonable doubt the guilt of defendant, is erroneous.
28. *Same; Argumentative Instructions.*—A charge which asserts that the law says it is better that the guilty go unpunished, than that the innocent, or those whose guilt is not shown beyond a reasonable doubt, should be punished, besides being erroneous, is argumentative.

APPEAL from Lawrence Circuit Court.

Heard before HON. D. W. SPEAKE.

The defendant was indicted for the murder of his wife, Murzy Parham, convicted of murder in the second degree and sentenced to the penitentiary for 20 years. It does not appear from the record what the difference between the copy of the indictment served on defendant and the

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original indictment consisted in. Motion to quash the venire and the objection of the defendant to being put on trial is stated in the record to be that no true copy of the indictment was served on defendant. The facts relative to the offense are sufficiently stated in the opinion. In his oral charge, the court defines murder in the first degree and then states to the jury that he would also define murder in the second degree as in their discretion they might, under the testimony, find the defendant guilty of murder in the second degree. The defendant objected to the court's defining murder in the second degree and to the statement of the court that the jury might in their discretion, under the evidence in the case, find the defendant guilty of murder in the second degree, and insisted that there were no extenuating circumstances and that the defendant was guilty of murder in the first degree or nothing. At the request of the state, the court gave the following written charges: "(A) I charge you, gentlemen of the jury, if you believe from all the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it is possible he is not guilty, you must convict him. (B) I charge you, gentlemen of the jury, that the doubt must be actual and substantial, and not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. (C) I charge you, gentlemen of the jury, that if you believe from the evidence in this case beyond a reasonable doubt that Murzy Parham came to her death at the hands of defendant, it matters not what sort of weapon she was killed with, or how the weapon was used, under the first count of the indictment. (D) I charge you, gentlemen of the jury, that the words 'reasonable doubt' do not mean absolute certainty; there is no such thing as absolute certainty in human affairs. (E) I charge you, gentlemen of the jury, that when a defendant attempts to prove an alibi the burden of proof is upon him to prove it successfully. (F) I charge you, gentlemen of the jury, that if after considering all the evidence you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, it is your duty to convict the

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defendant. (G) I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant has willfully sworn falsely as to any material matter in this case, you may, in your discretion, disregard his whole testimony."

The defendant requested the court, in writing, to give the following charges which were refused: "(4) I charge you, gentlemen of the jury, that the true test of the sufficiency of circumstantial evidence is whether the circumstances as proved produce a moral conviction to the exclusion of every reasonable doubt. If it does not, there should be no conviction. (6) I charge you, gentlemen, that the humane provision of the law is that there should not be a conviction upon the evidence unless, to a moral certainty, it excludes every other reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof that the law requires. (37) I charge you, gentlemen of the jury, that the humane provisions of the law are that one charged with the crime should not be convicted on circumstantial evidence unless it shows by a full measure of proof, beyond a reasonable doubt, that the defendant is guilty. Such proof is always insufficient unless it excludes, to a moral certainty, every reasonable supposition or hypothesis arising out of all the evidence but that of the of the defendant's guilt. No matter how strong the circumstances, if they can be reconciled with any theory generated by all the evidence that some one else may have done the act, then the defendant is not shown to be guilty by that full measure of proof the law requires and you should acquit him. (41) I charge you, gentlemen, that the humane provisions of the law is that upon the evidence there should not be a conviction unless, to a moral certainty, it excludes every reasonable hypothesis other than that of the guilt of the accused. No matter how strong the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof which the law

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requires. (13) I charge you, gentlemen of the jury, that if you, upon considering all of the testimony, have a reasonable doubt about the defendant's guilt, arising out of any part of the evidence, you should find him not guilty. (16) I charge you, gentlemen of the jury, that you should acquit the defendant unless the evidence excludes every reasonable supposition except that of his guilt. (21) Gentlemen, there is not sufficient evidence before you to authorize a verdict of guilty at your hands. (29) I charge you, gentlemen of the jury, that if you believe the evidence in this case, your verdict should be not guilty. (32) I charge you, gentlemen, that there is no evidence before you that the deceased, Murzy Parham, was murdered. (9) I charge you, gentlemen of the jury, that before you are authorized or justified in convicting this defendant the hypothesis should flow naturally from the facts proved and be consistent with all of them. (14) I charge you, gentlemen of the jury, that if after considering all the evidence in the case, your minds are left in a state of doubt or uncertainty as to whether the deceased, Murzy Parham, was killed by the defendant, or by being struck and run over by an engine on the track of the Southern Ry. Co.; then you are not satisfied of defendant's guilt beyond a reasonable doubt, and you should acquit him. (26) To convict the defendant, the evidence should be as strong as the positive testimony of one credible witness who proves beyond all reasonable doubt the guilt of the defendant. (27) Gentlemen of the jury, the law says that it is better far that the guilty go unpunished than that the innocent, or those whose guilt is not shown beyond a reasonable doubt, should be punished. (28) It is the theory of the law that it is better for the guilty ones to go without punishment, than that those should suffer punishment whose guilt is not shown by the evidence to a moral certainty and beyond all reasonable doubt. (33) Gentlemen, the law says that it is far better that the guilty should go unwhipped of justice than that the innocent should be punished. (30)

I charge you, gentlemen of the jury, that you should carefully examine the whole of the testimony, and that if upon the whole evidence your minds are left in a state

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of doubt or uncertainty that the defendant is guilty you should acquit him. (34) I charge you, gentlemen of the jury, that if you are reasonably doubtful as to the proof in this case, as to any material allegation of the indictment, you must acquit the defendant. (35) I charge you, gentlemen of the jury, that a probability that Murzy Parham came to her death in some other way than by the act of the defendant is sufficient to justify his acquittal. (36) I charge you, gentlemen of the jury, that if there is a probability that Murzy Parham was killed in some other way than by the act of the defendant, you should acquit him. (40) I charge you, gentlemen of the jury, that before you can convict this defendant, every member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant."

G. O. CHENAULT and LOWE & TIDWELL, for appellant. No brief came to the reporter.

MASSEY WILSON, Attorney General, for the State.—No brief came to the reporter.

DENSON, J.—Emmett Parham was indicted for murdering his wife Murzy Parham. He was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for 20 years. From the judgment of conviction, the defendant appealed.

There is no merit in the insistence that a copy of the indictment was not served on the defendant.—*Will Stoudenmire's Case*, (Ala., Nov. term, 1905) 40 South. 48; *Bodine's Case*, 129 Ala. 106. 29 South. 926.

The mangled remains of the dead wife were found on the track of the Southern Railroad in Lawrence county, at a point near a station called Hillsboro, on Sunday morning, July 15, 1905. It was not disputed that the body of the deceased had been run over and mangled by a train of cars, and the insistence of the state was that the defendant killed her and afterwards placed her body on the track for the purpose of covering up his crime. For the establishment of the insistence, and to show the guilt of the defendant, the state depended upon circum-

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stantial evidence. It was shown that there was a pool of water in a cow pasture not far from the point where the remains of the deceased were found. One of the theories of the state seems to be that the defendant drowned the deceased in that pool, and afterwards placed her body on the track of the railroad. They were a youthful couple, the defendant being 19 and the deceased 17. The evidence showed without dispute that they did not live together in harmony; they had separated two or three times, and at the time of the death of the deceased they were separated, the defendant was staying at Trinity, and the deceased was with her mother six miles away. A week before the killing the deceased walked to Trinity to see the defendant, he returned with her, and they spent Saturday night, Sunday and Sunday night at the home of the mother of the deceased, he defendant returning to Trinity on Monday morning. The following Saturday afternoon the deceased went to Trinity on the train, and the defendant associated with her there. And by his own testimony it was shown that she started in the night to return by foot on the railroad to her mother's home six miles distant from Trinity. He testified that he accompanied her a mile and a half on the way until they reached a road or path which he testified turned from the railroad, and led to the home of his father, there he left her, according to his evidence, to go alone in the night, four miles and a half on foot to her destination. Her mangled remains were found the next morning near Hillsboro, about four miles from the point where he testified that he parted from her.

Mrs. Hall, the mother of the deceased, after testifying to the strained relations that existed between the couple, and after testifying about their return from Trinity together on Saturday night and spending the time until Monday morning together at her home, testified that on that occasion defendant treated the deceased "nicely and kindly," and when he left her was as pleasant and as nice to her as he could be. On cross-examination the witness was asked this question: "What did he say to her when

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he left her that morning?" The ruling of the court sustaining an objection to the question may be sustained on the theory that, "the record does not show what answer from the witness was expected, so that this court can pass intelligently on the ruling, and we cannot, therefore, consider it."—*Tolbert's Case*, 87 Ala. 27, 36 South. 284; *Ross' Case*, 139 Ala. 144, 36 South. 718. "Furthermore, the question was very general, so much so, that irrelevant evidence would have been responsive to it."—*Ross' Case*, *supra*. Moreover, it affirmatively appears further on during the cross-examination that the witness testified that defendant, when he left deceased that Monday morning, asked the deceased to come to see to him. So, the question, it seems, was answered. The defendant followed the question above referred to with this one, namely, "Did Emmett (defendant) that morning, in the presence of the deceased, ask you to go with the deceased to Decatur to have some pictures taken?" The question was objected to as being immaterial. The theory of appellant is that proof that he wanted pictures of his wife taken would tend to show an affection on his part for her, and thus tend to disprove that he entertained enmity towards her. To put the court in error it should be made to appear by the bill of exceptions that the evidence sought to be elicited by the question was material. And unless this appears from the nature of the question, it is the duty of the party excepting to state to the court the answer that he expects. Nor does it plainly appear from the bill of exceptions whether it was the pictures of the wife or of the witness that were referred to by the defendant.

Aubin Williams, a witness for the state, who was section foreman of the Southern Railroad and had been for 15 years, after testifying that he saw the deceased's body on the railroad on the morning of the 16th of July, and after testifying in detail as to its appearance and the appearance of her clothing, etc., was asked, on cross-examination, this question: "Is it not a part of your business as an employe of the Southern Railway, when a person is found dead on the railroad track or killed by the train,

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to get up evidence in reference thereto for the railroad?" It has been argued that this question was competent for the purpose of showing interest or bias on the part of the witness. It having been shown without dispute that the witness was an employe of the railway company, the jury has this fact before them in weighing his evidence, and whether he had ascertained the facts about which he had testified voluntarily, or because it was his duty "to get up evidence," would seem to be immaterial. Moreover, the record fails to show that the facts about which he testified "were gotten up by him."

It was competent for the state to prove threats made by the deceased, to the effect that if the deceased did not quit following him around he was going to kill her. The threats were made a week before the death of the deceased occurred, and might be considered by the jury as tending to show malice on the part of the defendant, and a disposition to harm her. If the form of the question was objectionable (which we do not decide), no harm resulted, as the witnesses gave in detail what the defendant said in that respect. *Wilson's Case*, 140 Ala. 43, 37 South. 93; *Marler's Case*, 68 Ala. 580. There is nothing in the suggestion with reference to the ruling of the court on the admissibility of threats, that the corpus delicti had not been proved. If this was necessary before proof of threats was admissible, yet, under the evidence, it was a jury question.—*Vaghan's Case*, 130 Ala. 18, 30 South. 669.

Quint Terry, one of the witnesses by whom threats were proved, was a member of the coroner's jury that investigated the cause of the death of the deceased. On cross-examination, he testified that he said nothing about the threats before the coroner's jury, that he was a juror, and not a witness. He was asked if the coroner's jury was not instructed and directed to look up all the evidence they could that would bear on the question? The fact that witness knew of the threats and did not speak of them at the investigation was the only pertinent inquiry, and was fully brought out, and the instructions to the jury could add nothing to it as a discrediting cir-

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cumstance, and while, perhaps, it would not have been error for the court on cross-examination to have allowed the question, we cannot hold that the court erred in disallowing it.

The grounds of the objection made to the hypothetical question put to the physicians were overcome by proof subsequently made of the weight of the deceased, and that she was pregnant at the time of her death.

The question to Mrs. Hall, "Was she afraid to go about at night wherever she wanted to alone?" was properly disallowed. *Poe's Case*, 87 Ala. 65, 6 South. 378; *Thomas' Case*, 107 Ala. 13, 18 South. 229.

The objection to the question propounded to witness Gibson with respect to a pool of water becoming colored, was properly sustained. The question was not confined to the pool testified about by the witnesses, nor were the conditions of the indefinite pool shown to be the same as the one testified about.

The instructions given to the coroner's jury by the coroner could shed no light on the issues involved. Besides, the questions calling for such evidence were leading. No error was committed in sustaining objections to the questions calling for such instructions.

It was the duty of the court to instruct the jury in respect of the two degrees of murder. Hence, there is no merit in the exception reserved to the oral charge of the court.—Code 1896, § 4857; *Gafford's Case*, 125 Ala. 1, 28 South. 406.

Charges A and B, given for the State, assert correct propositions. *Jackson's Case*, 136 Ala. 22, 34 South. 188; *Winter's Case*, 123 Ala. 1, 26 South. 949; *McKleroy's Case*, 77 Ala. 95.

In one count of the indictment the means by which the defendant killed the deceased are alleged to be unknown. In the light of this allegation, charge C was properly given for the state.

In so far as charge D asserted a proposition of law it was correct. If the abstract assertion that there is no such thing as certainty in human affairs is inaccurate it would not infect the charge with reversible error.

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Given charge E has been expressly approved in the case of *Prater v. State*, 107 Ala. 26, 18 South. 238. And given charge F was approved in *Jackson's Case*, 136 Ala. 22, 34 South. 188; *Prater's Case*, *supra*.

Charge G asserts a correct proposition of law, and was properly given.—*McClellan's Case*, 117 Ala. 140, 23 South. 653.

Quite a number of charges, 21, were given at the request of the defendant, and 20 were refused to him. Charge 4, refused to defendant, is covered by charge 1, given at his request. At least he received all the benefit under that charge that he would have been entitled to under 4 if it had been given.

Charges 6, 37, and 41 were properly refused on the authority of the following cases:—*Bowen's Case*, 140 Ala. 65, 37 South. 233; *Turner's Case*, 124 Ala. 59, 27 South. 272; *Thomas' Case*, 106 Ala. 19, 17 South. 460; *Barnes' Case*, 111 Ala. 56, 20 South. 565.

The defendant received all the benefit under given charges 10 and 15, given at his request, that he would have been entitled to under charges 13 and 16 that were refused. Nothing more than the doctrine of reasonable doubt is asserted in these charges, and it will be observed from reading the charges that were given by the court at the request of the defendant, as shown by the bill of exceptions, that this doctrine was presented in many phases to the jury. And when the doctrine is once presented in a clear-cut charge, we can see no reason for requiring the court to give a dozen or more on the same line, nor do we believe that a multiplicity of such charges tend to enlighten the jury; but it may be they are not asked for that purpose.

Charges 21, 29 and 32, refused to the defendant, invade the province of the jury and for this reason are vicious.

Refused charge 9 is misleading, and incomplete, in that it does not notify the jury of the "hypothesis" that is referred to. Moreover, the defendant had the benefit of the principle attempted to be presented by the charge in given charge 5.

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Charge 14 was properly refused; it is substantially the same as charge 12 which was given at the request of the defendant.

Charge 26 has been several times condemned by this court.—*Mickle's Case*, 27 Ala. 20; *Faulk's Case*, 52 Ala. 415; *Bland's Case*, 75 Ala. 574; *Thornton's Case*, 113 Ala. 43, 21 South. 356, 59 Am. St. Rep. 97.

Refused charges 27, 28, and 33, besides being otherwise vicious, are mere arguments, and were properly refused.—*Barnes' Case*, 111 Ala. 56, 20 South. 565.

Charge 30, while not in the identical language of given charges 12 and 25, asserts the same proposition, and is substantially a duplicate. The court was under no duty to give it.—1 Mayfield's Dig. p. 174 (20).

Charge 34 was properly refused on the authority of *Stoball's Case*, 116 Ala. 454, 23 South. 162; *Littleton's Case*, 128 Ala. 31, 29 South. 390; *Thompson's Case*, 131 Ala. 18, 31 South. 725.

Charges 35 and 36 were substantially given in charges 17, and 18, and the court was under no duty to give the refused charges.

Refused charge 40 is a duplicate of given charges 11, and 22.

We have found no error in the record, and the judgment is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

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Murder.

(Decided June 14, 1906. 41 So. Rep. 924.)

1. *Grand Jury; Drawing and Summoning; Written Order of Court; Necessity; Record; Sufficiency.*—Under § 10 of the Act amending the Jefferson Criminal Court Act (Acts 1900-01 p. 217.) it is not essential that the opinion of the judge of the necessity

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for the organization of the grand jury be in writing; and where the record recites that the grand jurors were drawn according to law, and that the court did formally organize the grand jury at the beginning of the term from the grand jury venire returned by the sheriff, it is sufficiently shown that the opinion of the judge had been duly expressed and communicated to the proper officers, and that the jurors were duly drawn and summoned.

2. *Criminal Law; Indictment; Notice to Accused.*—The defendant need not have notice that an indictment has been returned against him, previous to arraignment, nor need a copy if it be served upon him prior to that time.
3. *Same; Verdict, Return of; Personal Presence of Defendant.*—While a verdict of guilty, in felony cases, cannot be returned in the absence of defendant, whose personal presence must affirmatively appear of record, it is not necessary that the record should state in direct terms that the defendant was present at the rendition of the verdict, and during all the previous proceedings of the trial. Where the record recites the presence of the defendant at the time of arraignment, the continuance of the trial from day to day and that defendant was personally present when sentence was pronounced, it sufficiently appears by implication that defendant was personally present from arraignment during the entire sitting of the court to the rendition of the verdict.
4. *Same; Questions Reviewable; Bill of Exceptions; Necessity.*—Motion in arrest of judgment assigning grounds therefor, together with the court's action thereon, cannot be reviewed on appeal, unless shown by bill of exceptions.
5. *Same; Bills of Exceptions; Time of Signing; Extension by Agreement.*—Under Acts 1890-91, p. 915, and an Act amendatory thereof, (Acts 1900-01 p. 227,) a bill of exceptions may be legally signed at any time within 60 days after verdict, whether it extends into the succeeding term or not; but a bill of exceptions is not signed within the time prescribed when the 60 days elapsed before the beginning of the next term, and the agreed extension of time carried it over in to the next term before signing. The time for signing cannot be extended by agreement into the next term, and the bill to be considered on appeal, must have been signed within the 60 days allowed by law.

APPEAL from Jefferson Criminal Court.

Heard before HON. D. A. GREENE.

The defendant was indicted, tried and convicted for killing Bert Pesnell by cutting him or stabbing him with

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a knife. The facts in reference to the motions and demurrers sufficiently appear in the opinion, except as to the seventh, eighth, ninth, tenth, eleventh, and twelfth ground for the motion and arrest of judgment, which were as follows: "(7) That the jury trying the defendant was not selected from the lawful venire. (8) That the jury that tried this case was not selected from the list served on defendant as a list from which he could select his jury from. (9) That many of the names served on the defendant as persons from whom he should select his jury were not in the number he did select from. (10) That the names of all the persons on the jury who tried defendant do not appear on the list served on the defendant as a list from which he should select his jury, nor were they all either on that list or drawn to complete the third jury for that week. (11) That the court improperly struck the defendant's special pleas in bar from the file without requiring the state to demur to such pleas or either of them. (12) That the court improperly eliminated the issues raised by the defendant's special pleas in bar without evidence or demurrer on or to said pleas." The defendant was convicted and sentenced to be hanged.

SHUGART & BELL, for appellant.—The record fails to show the presence of the defendant when the verdict of guilt was rendered by the jury. The record of the court should always disclose a trial by law.—*Hughes v. State*, 2 Ala. 102; *Sylvester v. State*, 71 Ala. 23; *Spicer v. State*, 69 Ala. 159; *Hayes v. State*, 107 Ala. 1; *Jackson v. State*, 102 Ala. 76; *Eliza v. State*, 39 Ala. 693; 1 Bish. Criminal Proc. § 272.

The pleadings were not settled, nor issue joined until after the jury was organized; and this was error.—*State v. Hughes*, 1 Ala. 655; *State v. Ferguson*, 134 Ala. 63.

The venire should have been quashed because the record shows no order for summoning the special venire. An oral order is not sufficient.—Acts 1890-91, p. 915; *Posey v. State*, 73 Ala. 494; *Sylvester's Case*, *supra*; *Spicer's Case*, *supra*.

The court erred in refusing to allow the juror Bennett to be challenged for cause.—*Charleston v. State*, Sou.

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Rep. 259; *Carr v. State*, 16 So. Rep. 150. The juror Moulton being related to counsel for prosecution, was subject to challenge for cause.—*Danzev v. State*, 28 So. Rep. 697. (Counsel discuss further errors in reference to the drawing of the jury but cite no authority).

There was no evidence of murder in the first degree.—*Compton v. State*, 110 Ala. 24; *Brown v. State*, 109 Ala. 76.

The court erred in refusing to charge the jury that a negro was entitled to the same treatment as a white man.—*Etheridge v. State*, 124 Ala. 106; *Posey's Case*, *supra*.

MASSEY WILSON, Attorney General, for State.—The record sufficiently shows the presence of accused when the verdict was rendered.—*Cawley v. State*, 133 Ala. 128; *Milton v. State*, 134 Ala. 42; *Stewart v. State*, 137 Ala. 33. Conceding that it is necessary to show an order of the presiding judge to summon the special venire, and that no such order is shown any error therein is cured by section 5269, code 1896.—*Shirley v. State*, 40 So. Rep. 269. The organization of the court shows that the law was fully complied with in reference to the jury.—*Stewart's Case*, *supra*; *Cawley's Case*, *supra*. The bill of exceptions cannot be considered as it was not signed in time.—*Adams v. State*, 40 So. Rep. 85.

DENSON, J.—The indictment was found during the September term, 1905, of the criminal court of Jefferson county, and was presented in open court on the 7th day of November, 1905. On the day the indictment was presented, the defendant being in open court, the court proceeded to arraign the defendant, when he objected to being arraigned because he had had no previous notice that the indictment had been returned into court, and because no copy of the indictment had been served on him. He also moved to quash the indictment for the same reasons. The law neither requires that the defendant in a criminal case shall have previous notice of the indictment nor a copy of it previous to his arraignment. The objection and motion were properly overruled.

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After overruling the objection and motion the court arraigned the defendant, he pleaded not guilty, and December 11, 1905, was fixed by the court as the day for the trial of the case. On the 11th day of December the defendant demurred to the indictment and moved to quash it. The gist of the demurrer and the motion is that the record fails to show that there was a written order of the presiding judge, or either of the judges, of the criminal court for drawing or summoning a grand jury for the September term 1905, of said court. Section 10 of the act amendatory of the act to establish a criminal court of Jefferson county, which amendatory act was approved December 7, 1900, provides: "That the grand and petit juries for said criminal court of Jefferson county shall be drawn, summoned and impaneled for each of said terms of said court, if in the opinion of the judges it is necessary to dispose of the business thereof, in the same manner as is now provided for or which may be hereafter provided by law in reference to said court, and shall have the same powers as the circuit courts to issue special venires and to summon tales jurors; Provided, that the judge of said court shall have the power to direct for what weeks of the term jurors may be drawn; and provided further, that they shall impanel at least two grand juries each year; and provided further, that all laws now in force as to the drawing, summoning and impaneling of juries shall in no wise be affected by the passage of this act, but same shall remain in full force and effect."—Acts 1900-01, p. 217. If the question is one which can be raised by demurrer, yet we do not think the act contemplates—at least it is not made indispensable—that the opinion of the judge referred to shall take the shape of or be expressed in the form of a written order to be incorporated in the organization of the court, but such opinion may be expressed orally. In this instance the record recites that the grand jurors were drawn according to law, and the court, as shown by the record, did formally organize the grand jury at the beginning of the September term from the venire turned into court by the sheriff. It must follow from this that the opinion of the

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judge had been duly expressed and communicated to the proper officials and the jurors had been duly drawn and summoned.—*Sudduth's Case*, 124 Ala. 32, 27 South. 487.

It is not claimed by the appellant that the record fails to show affirmatively that he was present when the verdict was received by the court—when it was rendered. It is settled law that in felony cases a verdict of guilty cannot be returned in the absence of the defendant, and his presence must be affirmatively shown by the record.—*Hayes' Case*, 107 Ala. 1, 18 South. 172; *Hughes' Case*, 2 Ala. 104, 36 Am. Dec. 411; *Young's Case*, 39 Ala. 357; *Sudduth's Case*, 124 Ala. 32, 27 South. 487. This legal right of defendant is fortified by an unbroken line of decisions, English and American. In fact, there is no dispute as to the law. But the difficulty arises in determining whether in point of fact the record fails to affirmatively show the presence of the defendant. It is stated in *Young's Case*, *supra*, that “possibly it is enough if the record show by fair inference that the prisoner was present when the sentence was pronounced.” The question there related to the prisoner's presence at the time of sentence, and we hold that if the recitals of the minute entries, reasonably construed and by fair inference, show the presence of the defendant, this would be an affirmative showing of his presence by the record.

The record here shows that the defendant was present in person on the 11th day of December, the day the case was tried; that on the call of the case for trial on that day the defendant was duly arraigned, and, after several preliminary motions made by the defendant were overruled; that issue joined on a plea in abatement was determined by the jury against the defendant; that he then filed the plea of not guilty and four special pleas; that the special pleas were, on motion of the state, stricken from the file. The record then recites: “And on this the 12th day of December, 1905, issue being joined on the defendant's plea of not guilty filed in this cause, thereupon case a jury of good and lawful men, to-wit, L. S. Kates and eleven others, who being duly impaneled and sworn according to law, before whom this trial was entered upon

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and continued from day to day and from time to time. Now on this the 16th day of December, 1905, said jurors on their oaths do say," etc. " * * * On the 19th day of December, 1905, the prisoner was present in open court in his own proper person, and, being asked by the court if he had anything to say why sentence should not be pronounced upon him, said nothing." So the record shows the personal presence of the defendant when arraigned on the indictment on the 11th, that he pleaded to it, and it also shows his personal presence at the sentence. It is not necessary that the record should state in direct terms that he was present at the rendition of the verdict and during all the previous proceedings of the trial, although such presence was essential.

The recitals of the minute entry of his personal presence at the arraignment on the 11th and that the trial was continued from day to day and from time to time, and of his personal presence when sentence was pronounced, and that he said nothing why sentence should not be pronounced, are sufficient to warrant the conclusion that the record by necessary and reasonable implication shows the personal presence of the prisoner during the entire sitting of the court from the arraignment to the rendition of the verdict. "The allegations of the continuance of the trial from day to day and time to time sufficiently indicate that it was with the incidents before described of which the presence of the prisoner was one." We hold, therefore, that the record by necessary and reasonable implication shows that the defendant was present at the rendition of the verdict, and thus his presence is affirmatively shown.—*Young's Case*, 39 Ala. 357; *Snow's Case*, 58 Ala. 372; *Banks & Wood v. State*, 72 Ala. 522; *Lovett's Case*, 29 Fla. 357, 11 South. 172; *Irvine's Case*, 19 Fla. 872; *Palmquit's Case*, 30 Fla. 73, 11 South 521; *Stephens' Case*, 19 N. Y. 549; *West's Case*, 22 N. J. Law, 212; *Dodge's Case*, 4 Neb. 220; *Peter's Case*, 94 Fed. 127, 36 C. C. A. 105; *Jeffries' Case*, 12 Allen (Mass.) 145; *Rhodes' Case*, 23 Ind. 24; *Schirmer's Case*, 33 Ill. 276; *State v. Langford*, 44 N. C. 436; *State v. Wood*, 17 Iowa, 18.

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After the verdict was rendered, but before sentence was pronounced, the defendant moved an arrest of judgment. The first four grounds of the motion presented the same question that was presented by the demurrer and motion to quash the indictment, and it is unnecessary to say more with respect of that question. The fifth and six grounds of the motion are fully answered by the record, which affirmatively shows service on the defendant of a copy of the venire, and the order of the court requiring that a copy of the venire be served; and an inspection of the record shows that the venires were drawn and formed in substantial conformity to the jury law applicable to Jefferson county as the same was construed in the case of *Maxwell v. State*, 89 Ala. 150, 7 South. 524. The other grounds of the motion present the questions which can be properly presented only by bill of exceptions.—1 Mayfield, p. 510, § 6 et seq.

The law provides that three terms of the criminal court of Jefferson county shall be held each year, and they commence on the first Monday in January, April, and September. It further provides that each term may continue until the business is disposed of, but expressly provides that the court shall adjourn 10 days before the beginning of the next term.—Acts 1890-91, p. 915. The trial in this case was held during the September term, the verdict was rendered on the 12th day of December, 1905, and the judgment and sentence were entered on the 19th day of December. The bill of exceptions was tendered, approved and filed on the 31st day of March, 1906, so that it appears to have been signed and filed after the adjournment of the term of the court next succeeding the one at which the trial was had, and more than 60 days after the conviction. The law applicable to bills of exception reserved on trials of causes in the criminal court of Jefferson county is found in the Acts Gen. Assem. 1890-91, p. 915. This law provides that all bills of exception must be filed in said court within 60 days after conviction; "provided that this act shall not be construed so as to prevent agreements in writing as to the time, between the solicitor and the counsel for defendant." On

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the 9th day of February, 1906, an agreement in writing was made between the solicitor and the attorneys for the defendant extending the time for filing the bill of exceptions "30 days beyond the time allowed by law for that purpose." On the 13th day of March, 1906, another agreement in writing was made between the solicitor and the attorneys for the defendant whereby the time for signing was "extended for and including the term of 60 days from the date when the same might have been signed under the former agreement."

Under the statute referred to, we think that the bill might have been legally signed at any time within 60 days from the conviction, notwithstanding the time of signing would have been after the next ensuing term of the court had begun.—*Driver v. King*, 145 Ala. 585, 40 South. (6) 315. And if there had been more than 60 days from the time of conviction until the next ensuing term, the time for signing might have been extended by agreement of counsel to any time before the beginning of the next term; but, when the 60 days given under the statute extend into the term next ensuing after the term of conviction, under previous decisions of this court the time cannot be extended by agreement of counsel, and the bill must be signed within the 60 days. It follows that the bill of exceptions cannot be considered.—*Adams' Case*, (Ala.) 40 South. 85, and authorities there cited.

There is no error in the record, and the judgment of the lower court is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON, TYSON, SIMPSON, and ANDERSON, JJ., concur.

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Murder.

(Decided June 30, 1906. 41 Sc. Rep. 761.)

1. *Jury; Special Venire; Drawing Jury.*—It is not essential, under § 5004, Code 1896, that the presiding judge call out the names of the jurors as he draws them from the jury box.
2. *Same; Selection of Jurors.*—Where it affirmatively appears that the list of jurors made by the clerk was composed of the names drawn by the judge and placed in an envelope; that the names were an exact copy of the names on the list so made out, and that a copy of the names were served on the defendant on the day before his trial, it was not prejudicial to the defendant that the clerk did not make out a list of the names immediately after they were drawn, but kept them in an envelope and made out the list some four hours later; and, if not strictly in accordance with § 5004, any error was cured by § 4333, Code 1896.
3. *Same; Mistake in Name; Motion to Quash.*—A mistake in the name of any person drawn as a juror for the trial of a capital case, either in the venire or the copy served on defendant, is not sufficient grounds upon which to quash the venire, or delay the trial, under the express provision of § 5007, Code 1896. The court must discard such names and direct that others be forthwith summoned.
4. *Criminal Law; Evidence; Res Gestae.*—Evidence that after shooting, deceased defendant shot a brother of deceased, is admissible as part of the res gestae. So, also, evidence that some of the shot from defendant's gun went through the clothes of a witness.
5. *Same; Evidence; Exclusion of Evidence.*—The party calling forth an answer responsive to his question has no right to have it excluded.
6. *Same; Opinion Evidence; Conclusions.*—A witness may not state that if certain named persons had exchanged pistols he would have seen it. Such a statement is a mere conclusion.
7. *Same; Instructions; Impeachment of Witness.*—An instruction asserting that if the jury did not believe from all the evidence, that the witness made the contradictory statements attributed to him, then such witness was not impeached, was correct and improperly refused.

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8. *Same; Credibility of Witness.*—A charge asserting that if the State's witnesses had exhibited bias against the defendant or anger, and satisfied the jury that they had not testified truly, and that they were not worthy of belief, and the jury thought their testimony should be disregarded, the jury might discard it altogether, is correct and its refusal error.
9. *Same.*—A charge asserting that if upon all the evidence the jury believed that the testimony as to the good character of certain witnesses is sufficient to overcome the impeaching testimony against them, the jury should weigh their testimony in the light of this proof of good character along with all the other evidence, falls within the exception to the rule against giving undue prominence to particular parts of the evidence, and the rule that charges should not be argumentative, is a correct charge and its refusal error.
10. *Same; Interest of Defendant as a Witness.*—A charge asserting that the jury must consider the testimony of the defendant in the light of the interest he has in the result of the prosecution, was properly given.
11. *Same; Appeal; Presumptions; Consistency of Instruction.*—Where the oral charge of the court is not set out in the transcript, it will be presumed, on appeal, that the charges given for defendant were not in conflict therewith.
12. *Same; Instructions; Reasonable Doubt.*—A charge asserting that it makes no difference in what language the definition of a reasonable doubt is clothed, when boiled down and brought to its last analysis it means no more or less than a doubt growing up out of all the evidence for which the jury can give a reason, as contradistinguished from a mere possibility, while calculated to mislead and confuse the jury, and the better practice is to refuse such charges, does not constitute reversible error.
13. *Homicide; Evidence; Admissibility; Circumstances Preceding Act.*—It is proper to limit defendant to proof of charges against deceased for violation of the ordinances, and not permit details of the act and conduct of deceased upon which the charges were based, when it appears that the defendant was marshal of the town, and the evidence tended to show that he was attempting or intending to arrest deceased on such charges at the time the killing occurred.
14. *Same; Justifiable Homicide; Arrest.*—A marshal in good faith attempting to arrest, is justified in firing first when the offender was armed with a pistol and committed an overt act evidencing an intent to immediately use the pistol under such cir-

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cumstances as were sufficient to create in the mind of a reasonable man, and did create in the mind of the officer, the belief that the offender was about to draw the pistol and immediately fire.

15. *Same; Evidence; Admissibility; Threats; Bad Character.*—It was error to exclude threats alleged to have been made by deceased against defendant, and to exclude evidence tending to show that deceased was a turbulent, dangerous and bloodthirsty character, where the defense was that the defendant, the town marshal, was in good faith, attempting to arrest deceased for a violation of the town ordinances, when the killing occurred.
16. *Same; Instructions; Self Defense.*—Where there was evidence tending to show that defendant approached deceased under guise of making an arrest, but killed from vengeance or anger at deceased, instructions seeking to invoke the doctrine of freedom from fault which fall to hypothesize good faith on the part of the defendant in carrying a gun and in making the arrest, are bad and properly refused.
17. *Witnesses; Recalling Witnesses for Impeachment.*—It is within the discretion of the trial court, and not revisable on appeal, to allow the solicitor to recall defendant's witnesses for the purpose of laying a predicate to impeach them; and if permitted by the court to do so, this act does not make such witnesses state witnesses.
18. *Arrest; Police; Right to Arrest Without Warrant.*—A marshal or policeman has a right to arrest without warrant for a violation of the town ordinance committed in his presence.

APPEAL from Covington Circuit Court.

Heard before HON. H. A. PEARCE.

The defendant, Abb Hammond, was indicted, tried, and convicted of killing Bud Tucker by shooting him with a gun. Before entering upon a trial of the cause the defendant moved the court to quash the venire, assigning the following reasons: "Because the special venire of 50 names was not drawn as provided by law, in that the presiding judge did not cause the clerk of the court to make out a list of the special venire immediately as provided by section 5004 of the code, and because the clerk did not immediately make out said list, and because the presiding judge of the court did not publicly draw from the jury box the names of

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50 persons served on defendant as a special venire from which he is to select a jury in this case, and cause the clerk of said court to immediately make out a list of the 50 names and issue an order to the sheriff and serve the same on the defendant, and because the presiding judge did draw from the box 50 persons as a special venire to try defendant's case, and caused the clerk of said court to place the 50 names so drawn in an envelope and seal the same and put it in his pocket, and did not immediately make out a list of said names, but took the said names away and four hours afterwards made out the list; because the said judge did not call out the names so drawn to serve as a special venire in open court, and did not cause the clerk in the presence of the court and in open court to make out a list, but let him seal the same up and take it away in his pocket; because the regular list of the regular venire drawn and summoned to serve during the second week of said term of said court was not served on this defendant, in that C. C. Caxton was drawn and summoned as a regular juror, and no such man was drawn and summoned to appear and serve as a juror for said second week, but that C. C. Caxton was summoned to serve as a juror, when there is no such man in Covington county, but C. C. Croxton answered to the name of C. C. Caxton, and said Croxton was placed on the regular panel of the jurors. but was not served on the defendant, and because V. M. Hayes was drawn as a juror on the regular panel, and there was no such man on the regular panel or served on the defendant but W. V. Hayes was put on the regular panel and not served on defendant." The court overruled this motion. The motion was afterwards amended, but was practically the same motion amplified. The court, being satisfied from the evidence that there was a mistake in the names, of the two jurors, Hayes and Caxton, and that there were no such persons living in Covington county, directed that those two names be discarded, and ordered the sheriff to summon two qualified citizens of the county to serve in their stead. The sheriff complied by summoning C. C. Croxton and W. V. Hayes, who were placed on the regular panel and qualified as jurors.

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It appears from the evidence that Hammond was marshal of the town of Florala, and shot and killed Bud Tucker on the streets of said city with a gun, and fired at Jim Tucker, a brother of Bud. The other facts sufficiently appear in the opinion.

There were numerous charges requested by the defendant, some of which were given and 64 of which were refused. Those refused and criticised are as follows: (55) "If in this case the jury do not, upon a consideration of all the evidence, believe the witness Jim Johnson made the statements which the witness Lawrence testified Johnson did make to him, then Johnson is not impeached. (58 "If any of the state's witnesses have exhibited malice against the defendant or anger, or have testified to contradictory statements and thereby satisfied the jury that they have not testified truly, and are not worthy of belief, and the jury think their testimony on these accounts should be discarded, they may discard it altogether." (64) "If upon all the evidence the jury believe that the testimony as to the good character of the witnesses Jim Johnson and Bryant is sufficient to overcome the impeaching testimony against these, if there is impeached testimony, they should weigh their testimony in the light of this proof of good character along with all the other evidence in the case."

The court gave at the request of the solicitor the following charges: "(A) The court further charges the jury that they must consider the testimony of Abb Hammond, the defendant, in the light of the interest he has in the prosecution. (B) The court further charges the jury that all the charges read by defendant's counsel do not in any way conflict with, but are in harmony with, the charge given by the court, and they should not consider them to the exclusion of the charge of the court, because the written charges are only a different way of expressing the law. (C) The court further charges the jury that it makes no difference in what language the definition of a reasonable doubt is clothed. When it is boiled down and brought to its last analysis, it means no more nor less than a doubt growing up out of all the evidence in the case for which you can give a reason, as contradistinguished from a mere possibility."

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C. E. REID, M. SOLLIE, and STALLINGS, NESMITH & DRENNEN, for appellant.—The record fails to disclose that the defendant was ever in court after his arraignment and the day set for his trial. This is fatal to the judgment of conviction.—*Eliza's Case*, 39 Ala. 696; *Sylvester's Case*, 71 Ala. 17; *Spicer's Case*, 69 Ala. 159; *Jones' Case*, 97 Ala. 77; *Waller's Case*, 40 Ala. 332.

The venire should have been quashed for the reasons pointed out in the motion.—*Smith's Case*, 133 Ala. 73; *Ryan's Case*, 100 Ala. 108; *Thomas' Case*, 94 Ala. 74. The threats were admissible.—*Green's Case*, 69 Ala. 9; *Gafford's Case*, 122 Ala. 64; *Robert's Case*, 68 Ala. 164.

The court erred in refusing to allow defendant to show the character of deceased as a turbulent, dangerous and bloodthirsty man.—*Green v. State*, 39 So. Rep. 365; *Roberts' Case*, *supra*. The court erred in declining to allow Gibson to testify as to what happened at Tucker's house just before he started for Florala.—*Burton's Case*, 115 Ala. 10; *Pitts v. Burroughs*, 6 Ala. 733. The court erred in permitting witnesses Johnson and Bryant to be recalled.—*Bell v. Burke*, 46 Ala. 261. The court erred in overruling defendant's objection to the question propounded to the witness Tucker as to what happened in Holley's restaurant.

Charges 37, 38 and 48 should have been given.—*Goodwyn's Case*, 102 Ala. 87. Charge 41 should have been given.—*Brown's Case*, 118 Ala. 111; *Picken's Case*, 115 Ala. 42; *Brown's Case*, 108 Ala. 18; *Burton's Case*, 107 Ala. 108. Charge 59 should have been given.—*Pitts' Case*, 140 Ala. 70; *Burton's Case*, 115 Ala. 1; *Frazier's Case*, 93 Ala. 45. Charge 64 was good and its refusal error.—*Byer's Case*, 105 Ala. 40; *Mitchell's Case*, 94 Ala. 73. Charge 53 was good.—*Mitchell's Case*, 129 Ala. 23. Charge 58 was good.—*L. & R. R. Co. v. Tegnor*, 126 Ala. 593; *Drum v. Harrison*, 83 Ala. 384.

MASSEY WILSON, Attorney General, for State.—The record sufficiently shows the presence of the accused, and if it does not, the bill of exceptions sufficiently shows it.—*Bradford v. Boozer*, 139 Ala. 506; *McLendon v. Grice*, 119 Ala. 513.

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The court complied with section 5004 in drawing the jury, and if any errors were committed they were cured by section 5007.—*Martin v. State*, 40 Ala. 275.

As part of the *res gestae* the court properly permitted evidence of the shooting of other persons by the defendant.—*Seams v. State*, 84 Ala. 410; *Plant v. State*, 140 Ala. 52. The details of the charges against deceased were inadmissible.—*Carden v. State*, 84 Ala. 417; *Gordon v. State*, 140 Ala. 29. What occurred between defendant and deceased on Monday was not admissible.—*Gordon v. State*, *supra*; *Carden v. State*, *supra*; *Harkness v. State*, 129 Ala. 71. Threats alleged to have been made by deceased were not admissible.—*Johnson v. State*, 136 Ala. 76; *Gilmore v. State*, 141 Ala. 51. The charges against deceased were all misdemeanors and the authority of the officer to arrest and shoot a person so charged is defined in *Handley v. State*, 96 Ala. 48. It was within the discretion of the court to allow the witnesses Johnson and Bryant to be recalled for the purpose of impeachment.—*Braham v. State*, 38 So. Rep. 919.

All of the special charges might have been refused to defendant on the ground that under the uncontradicted evidence he was guilty of murder.—*Teague v. State*, 120 Ala. 309; *Gilmore v. State*, 141 Ala. 51. But all the charges were bad. Charges 37, 38, 46 and 48, were bad on the authority of *Mitchell v. State*, 133 Ala. 65; *Plant v. State*, *supra*. Charges 39, 40, 44, 45, 57 and 61 were properly refused.—*Reese v. State*, 135 Ala. 13; *Handley v. State*, 96 Ala. 48. Charges 41 and 62 were mere arguments.—*Neville v. State*, 123 Ala. 99ff. Charges 43, 42, 52 and 64 were arguments also.—*Hussey v. State*, 86 Ala. 34. Charge 49 was bad.—*Mann v. State*, 134 Ala. 1. Charge 50 was misleading.—*Wilson v. State*, 140 Ala. 52. Charges 51 and 53 were bad.—*Mann v. State*, *supra*. Charges 54, 56 and 53 were bad.—*Teague v. State*, 144 Ala. 42; *Hussey v. State*, *supra*. Charges 58 and 59 were bad.—*Brown v. State*, 38 So. Rep. 268. Charge 60 was properly refused.—*Liner v. State*, 124 Ala. 4; *Winter v. State*, 133 Ala. 176. Charge A given for the state was proper.—*Smith v. State*, 118 Ala. 117. Charge C was also properly given.—*Caddell v. State*, 136 Ala. 9.

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DENSON, J.—Abb Hammond was convicted in Covington circuit court of murder in the first degree and sentenced to imprisonment in the penitentiary for life. From the judgment of conviction the defendant has appealed.

The motion to quash the venire was properly overruled. Section 5004 of the code of 1896 does not require that the presiding judge shall announce the names of the jurors as they are drawn from the box; and while we think it is better practice for the clerk to make a list of the names immediately as they are drawn from the box by the presiding judge, it is unnecessary in this instance for us to decide that the statute is mandatory in this respect, as the bill of exceptions affirmatively shows that the list that was made by the clerk was composed of the identical names that were drawn by the presiding judge and placed in the envelope by the clerk, and, further, that the names served on the defendant were copies of the names on the list so made out, so that we are satisfied no injury could possibly have resulted from the manner in which the names of the jurors were drawn and disposed of, nor from the delay of the clerk in making the list.—Code 1896, § 4333. It is shown that a copy of the names of the jurors was served on the defendant one entire day before the day fixed for the trial. This was a compliance with the law.

Evidently there was a mistake in the names of the jurors Croxton and Hayes; but it is statutory, and has been many times decided by this court that this furnishes no ground for quashing the venire.—Code 1896, § 5007; *Kimbrel's Case*, 130 Ala. 40, 30 South. 454; *Longmire's Case*, 130 Ala. 66, 30 South. 413. The court conformed to the statute in discarding the names of the two jurors and ordering two others to be summoned.—Code 1896, § 5007.

The exceptions to the ruling of the court on the admissibility of evidence are numerous. The sixth, seventh, eighth, and ninth relate to the ruling permitting the state to prove that immediately after shooting the deceased the defendant shot the brother of the deceased.

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In this there is no error. Shooting the brother was a part of the *res gestae*.—*Seams' Case*, 84 Ala. 410, 4 South. 521; *Smith's Case*, 88 Ala. 73, 7 South. 52; *Plant's Case*, 140 Ala. 52, 37 South. 159. Evidence that some of the shot from the gun passed through the witness' clothing was also of the *res gestae* and admissible.

The court properly limited the defendant to proof of the charges against the deceased for violation of the ordinances of the town. Details of the acts and conduct on the part of the deceased upon which the charges were based were incompetent and inadmissible.—*Carden's Case*, 84 Ala. 417, 4 South. 823; *Gordon's Case*, 140 Ala. 29, 36 South. 1009; *Harkness' Case*, 129 Ala. 71, 30 South. 73. Moreover, the proof was without conflict that the deceased was carrying a concealed weapon and that the defendant saw the deceased when he concealed it—that the offense of carrying a concealed weapon was committed in defendant's presence; and the defendant testified that he went up to arrest deceased for carrying the pistol concealed at that time, and for "other things" before. So defendant had the benefit of the evidence that he was an officer and attempting to arrest the deceased for an offense that was committed in his presence. The defendant was a policeman at the time the killing occurred, and as such he had the authority, and it was his duty, to arrest persons for violations of the ordinances of the town; and this he could do without warrant if the offense was committed in his presence. To submit to an arrest under such circumstances was the correlative duty of the deceased. In Russell on Crimes it is stated: "In all cases, whether civil or criminal, where persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, the homicide is justifiable."—1 Russell on Crimes, 665; *Clements' Case*, 50 Ala. 117. "Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for

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such purposes, and such officers are clothed by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed."

There are two theories of the prosecution in this case. The first is that the defendant of his own malice, and not in the discharge of his duty, killed the deceased to avenge a personal grievance. The second is that, if he was in good faith, attempting or intending to arrest the deceased, the circumstances did not authorize the use of the force employed. We think the evidence afforded an inference of the correctness of these theories. At the same time, the defendant's insistence on the trial was, and is here, that in good faith he was, with knowledge on the part of the deceased that he was a policeman, attempting to arrest the deceased and have him make bond for an offense or offenses in violation of the ordinances of the town committed in his presence. If the defendant was in good faith attempting to arrest the deceased, and if deceased was armed with a pistol and at the time of the attempted arrest he manifested an intention to resist the arrest, and committed an overt act which manifested an intent to immediately use the pistol under such circumstances as were sufficient to create in the mind of a reasonable man, and if they did create in the mind of the defendant an honest belief that the deceased was going to draw the weapon and immediately fire on him in resistance of arrest, then the defendant was justified in firing first.—*U. S. v. Rice*, 27 Fed. Cas. 795, No. 16,153; *Adams' Case*, 72 Ga. 85; *Boykin's Case*, 22 Colo. 496, 45 Pac. 419; *Morton v. Bradley*, 30 Ala. 683.

Upon consideration of the evidence we think, and hold, that there was some evidence which tends to support the defendant's theory, its weight, of course, was a question for the determination of the jury. Upon these considerations we hold that the court erred in declining to allow evidence of threats made by the deceased against the defendant and in declining to allow evidence tending to show that the deceased was a turbu-

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lent dangerous and bloodthirsty character.—*Green's Case*, 69 Ala. 6; *Robert's Case*, 68 Ala. 156; *Meyers' Case*, 62 Ala. 599; *Burns' Case*, 49 Ala. 370; *Jones' Case*, 116 Ala. 468, 23 South. 135; *Gafford's Case*, 122 Ala. 54, 25 South. 10; *Storey's Case*, 71 Ala. 329.

It was within the irrevisable discretion of the court to allow the solicitor to recall witnesses for the defendant for the purpose of laying a predicate for their impeachment by proof of contradictory statements; and by calling them the state did not, as is insisted by the appellant, make them its witnesses.—*Jones' Case*, 115 Ala. 67, 22 South. 566; *Dudley's Case*, 121 Ala. 4, 25 South. 742; *Thomas' Case*, 100 Ala. 53, 14 South. 621; *Thompson's Case*, 100 Ala. 70, 14 South. 878; *Braham's Case*, (Ala.) 38 South. 919.

If a witness answers a question, and the answer is responsive, the party asking the question has no right to have the answer excluded. To acknowledge such right would be allowing the party to experiment.—*Toliver's Case*, 94 Ala. 111, 10 South. 428. In allowing Bart Tucker to testify that Holley testified that, "if said Tucker had exchanged pistols at his restaurant, he (Holley) would have seen it," the court erred. Such evidence was a mere conclusion of the witness Holley.—*Reeces' Case*, 96 Ala. 33, 11 South. 296; *E. T., V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 South. 813; *Ferguson's Case*, 134 Ala. 63, 32 South. 760.

In this case 100 written charges were requested by the defendant. Careful consideration of the case will reveal to any reasonable man an entire lack of necessity for this number of charges being flooded on the presiding judge and on this court for review. Every proposition in the case, we do not hesitate to say, could have been presented and covered by a dozen written charges. Then why so many written requests? Thirty-six of the 100 charges requested were given and 64 were refused. We shall not criticise the refused charges in detail. To do so would be both unprofitable and a useless consumption of time. Of the refused charges, those numbered 55, 58 and 64 assert correct proposi-

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tions and should have been given. They fall within the exception to the rule against giving undue prominence to particular parts of the evidence and the rule that charges should not be argumentative.—*Hale's Case*, 122 Ala. 85, 26 South. 236; *Perry's Case*, 78 Ala. 22; *Smith's Case*, 88 Ala. 73, 7 South. 52; *Roberts' Case*, 122 Ala. 47, 25 South. 238.

As has been intimated in a previous paragraph in this opinion, there is a tendency of the evidence to the effect that the defendant approached the deceased under the guise of making an arrest and killed him for the purpose of wreaking vengeance on him; in other words, that the insistence that the defendant approached the deceased for the purpose of making a legal arrest is an afterthought—a mere pretense. In the light of the tendency of the evidence, those charges refused to the defendant which sought to invoke the doctrine of freedom from fault, of which No. 39 is an example, are bad. If for no other reason, they fail to hypothesize good faith on the part of the defendant in carrying the gun. Certainly, if the defendant was approaching the deceased, not having a purpose in good faith to arrest the deceased, but for the purpose of engaging in a difficulty with him, he was not without fault.—*Reese's Case*, 135 Ala. 13, 33 South. 672; *Necley's Case*, 20 Iowa, 108; *Benham's Case*, 23 Iowa, 154, 92 Am. Dec. 416. All other refused charges were properly refused. Some of them if not inherently bad, were substantially duplicates of charges which the record shows were given for the defendant, while the others were vicious in one or more particulars.

In giving charge A for the state the court committed no error.—*Wilkin's Case*, 98 Ala. 6, 13 South. 312; *Norris's Case*, 87 Ala. 85, 6 South. 371; *Smith's Case*, 118 Ala. 117, 24 South. 55.

The oral charge of the court is not set out. Therefore we are not in position to determine the correctness or not of charge B, given at the request of the state; but, in the present state of the record we will presume in favor of the court, that the charges given for the defendant were not in conflict with the oral charge.

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Charge C, given for the state, was calculated to mislead and confuse the jury, and, while it is the better practice to refuse such charges, yet the giving of the charge does not constitute reversible error.—*Cuddell's Case*, 136 Ala. 9, 34 South. 191, and cases there cited.

It has been strenuously urged by counsel for the appellant that the record proper fails to show the presence of the defendant when the verdict of the jury was received. While, on account of reversible errors found in the record, it is not necessary for us to determine this question, we suggest that it is just as easy for the clerk to make the record show by direct recitals the presence of the defendant during the entire trial as it is to leave such important features to rest in inference, and more care should be taken in this respect by those who write and supervise minute entries.

For the errors pointed out, the judgment appealed from is reversed, and the cause remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, J.J.,
concur.

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Incest.

(Decided June 30, 1906. 41 So. Rep. 734.)

1. *Incest; Indictment.*—An indictment charging that, D. a man, being the father of C. D., a girl, and within the (prohibited) degree of consanguinity, etc., did have sexual intercourse with said C. D., was not subject to demurrer for failing to charge that C. D. was a woman; that is, a female at the age of puberty; charging, as it does, that she was a girl is sufficient.
2. *Same; Elements.*—The crime of incest may be committed, so far as the man is concerned, with a female not arrived at the age of puberty.

APPEAL from Conecuh Circuit Court.
Heard before HON. J. C. RICHARDSON.

[Dixon v. The State.]

John Dixon was convicted of incest, and appeals. The facts sufficiently appear in the opinion.

E. E. NEWTON, for appellant.—The indictment is not sufficient. A girl is not a woman. A woman is a female past age of puberty.—Words & Phrases, Vol. 8, p. 7513; *Blackburn v. State*, 28 Ohio St. 110.

Incest is of purely statutory origin.—10 A. & E. Ency. Law, p. 335. The words of the statute must be strictly followed therefore, in an indictment charging this offense.—*Sparrenburger v. State*, 53 Ala. 481.

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

HARALSON, J.—The statute against incest is: "If any man and woman" (within the prohibited degrees), have sexual intercourse together, etc., they must on conviction be punished as herein prescribed.—Code 1896, § 4889. The indictment charges that "John Dixon, a man, being the father of Callie Dixon, a girl, and within the (prohibited) degree of consanguinity, etc., did have sexual intercourse with the said Callie Dixon," etc. There was a demurrer to the indictment in substance that it does not charge that the defendant had sexual intercourse with a woman; did not aver that Callie Dixon was a woman, nor did it state her age, whether under or over ten years, etc.

The contention of the defendant is, that the indictment is defective in the use of the word "girl," instead of the word "woman;" that the term "woman", is a female who has passed the age of puberty, while a girl may not have passed that age.

This distinction is without force, unless the crime of incest cannot be committed with a female who has not passed the age of puberty. We apprehend that the offense may be committed, at least by the man, on a female within the prohibited degree, without respect to her age.

An indictment alleged: "Walter Butler did assault Delia McCall, a woman, with the intent forcibly to rav-

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ish her." The proof showed, that Delia McCall was a girl, eleven years of age. The defendant was convicted and this court held, that there was no variance for that, between the allegations and proof. The defendant asked the charge: "Unless the jury believe from the evidence that Delia McCall had reached the age of puberty there can be no conviction in this case," which charge was refused, and as held by us, properly so.—*Butler v. State*, 120 Ala. 668, 25 South. 1024.

In *King v. State*, 120 Ala. 332, 25 South. 178, the indictment was in Code form, except in the substitution of the words "a girl under the age of ten years" for the word "woman," used in form 12 charging an assault on a woman with intent forcibly to ravish her, and it was held, that it sufficiently charged an offense under section 4346 of the Code of 1896, making it an offense to commit "an assault on another," with intent to ravish. The distinction attempted to be drawn is too technical to be meritorious.

No other error is raised and insisted on in the record. The demurrer was properly overruled.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

Nathan Knight v. The State.

Seduction.

(Decided July 6, 1906. 41 So. Rep. 850.)

1. *Seduction; Evidence; Consent.*—Where the act of intercourse was not shown to have been consummated between prosecutrix and the witness, evidence that the prosecutrix consented to have intercourse with the witness, was immaterial.
2. *Same; Impeachment of Prosecutrix; Rebuttal.*—Evidence as to the general character of the prosecutrix for virtue and chastity is admissible to rebut evidence offered to impeach her chastity.

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3. *Seduction; Jury Question.*—Whether the act of intercourse was the result of force or of seduction is a question for the jury.

APPEAL from Pike Circuit Court.

Heard before Hon. H. A. PEARCE.

The evidence tended to show that accused and prosecutrix were engaged, and had been engaged for some time before the alleged act of intercourse was had, and that consent was obtained by means of promise of marriage. Prosecutrix stated that she did not consent to the act, but that defendant took her in his arms, and without her consent and against her will and by force had intercourse with her. The defendant requested the court to charge the jury as follows: "The jury cannot convict the defendant in this case, because Miss Carrie Green testified that the first act of intercourse with defendant was accomplished by force and against her will." The court declined to give it. Defendant was sentenced to the penitentiary for a period of ten years.

No counsel marked for appellant.

MASSEY WILSON, Attorney-General, for State.—The act not shown to have been consummated, the fact that prosecutrix agreed to have intercourse with Windham, was immaterial as affecting her credibility. Evidence of the woman's character for virtue and chastity was admissible.—*Smith v. State*, 107 Ala. 139; *Suther v. State*, 118 Ala. 88.

SIMPSON, J.—The defendant in this case was convicted of the crime of seduction. The exception to the question to the witness Windham as to whether the prosecutrix had ever consented to have sexual intercourse with him was properly sustained; the act not having been consummated. Evidence having been offered tending to impeach the chastity of the prosecutrix, it was proper to admit testimony as to her general character for virtue and chastity.—*Smith v. State*, 107 Ala. 139, 18 South. 396; *Suther v. State*, 118 Ala. 88, 98, 24 South. 43.

There was no error in the refusal of the court to give the general charge requested in favor of the defendant.

[Bradford v. The State.]

Under section 4972 of the Code of 1896 the case was properly triable in Pike county, and there was evidence to justify a verdict of guilty.

There was no error in the refusal of the court to give charge 2, requested by the defendant. The prosecutrix, on cross-examination, described how the act was accomplished; and it was for the jury to determine, from all the evidence, whether the prosecutrix finally yielded under temptation, or otherwise, as mentioned in the statute. In addition, this matter was fully placed before the jury in the most favorable light to the defendant by charges given by the court at the request of defendant.

The judgment of the court is affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

Bradford v. The State.

Grand Larceny.

(Decided June 7, 1906. 41 So. 462.)

1. *Criminal Law; Evidence; Res Gestae; Other Offenses Part of Same Transaction.*—The defendant being indicted for the larceny of a locket, it was competent to show that defendant was in prosecutrix room and remained there while prosecutrix was out, and that on her return defendant was gone and prosecutrix pocket book containing the locket and some money was missing, it all being part of the same transaction.
2. *Same; Subsequent Incriminating Circumstances; Intent to Escape.*—It was proper to admit in evidence that portion of defendant's letter to his mother in which he said, in effect, that they intended to send him to the penitentiary, but it would not be done, as he intended to break jail, as affording an inference that it was inspired by consciousness of guilt.

APPEAL from Montgomery City Court.
Heard before Hon. W. H. THOMAS.

[Bradford v. The State.]

Defendant was indicted, tried and convicted of the larceny of a gold locket of the value of \$50, the property of another. The evidence tended to show that the defendant was in the room of the person who lost the locket, and remained there while such person was out, and that on returning to the room defendant was gone, and a pocketbook with the locket in it was missing. It was afterwards found where defendant told the police officer he had left his clothes that morning. The state asked the witness, after she had testified that she had a pocketbook on the dresser in her room with some money and the locket in it, what she missed from her room that morning. The defendant objected to the question. The court overruled the objection, and permitted the witness to answer: "When I left my room, there was a pocketbook with a locket and \$10 in money in it, and when I returned the pocketbook, money, and locket were missing." Defendant objected to this answer, and moved to exclude it, which was overruled, to which action the defendant excepted. When the defendant as a witness was being examined, the solicitor asked him on cross examination if he did not write a certain letter, then shown him, to his mother. The defendant objected to this question, but the court overruled the objection, and instructed the witness to answer, and the defendant excepted. The witness admitted writing the letter, and the solicitor offered in evidence a portion of the letter, which is in words and figures as follows: "Montgomery, Ala., October 25, '05. My Dear Mother: I learned today that I was indicted, and now I know that they intend to railroad me to the penitentiary, if they can; but they won't, for I am going out of this jail, dead or alive, if I have to kill somebody to do it. If I get away safe, I'm going to South America, and I will write you when I get there. If I had anybody here to get me a file, I could get out of here at night, and no one would know it; but I don't know any one here, so can't get one. So I will have to take my only chance and fight for it." Defendant objected to the introduction of the letter. The court overruled the objection, and permitted the letter

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to go to the jury. The defendant was convicted, and sentenced to a term of two years in the penitentiary.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

TYSON, J.—The taking of the locket and money constituted the same transaction. It was therefore competent to prove the taking of both, although only the larceny of the locket was charged in the indictment.—*Ray v. State*, 126 Ala. 9, 28 South. 634.

That portion of the letter written by the defendant, admitted in evidence, afforded an inference for the jury that it was inspired by a consciousness of guilt. There was no error in the ruling of the court on this point.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Hargrove v. The State.

Burglary.

(Decided June 30, 1906. 41 So. Rep. 972.)

1. *Criminal Law; Evidence; Trailing with Dogs.*—Evidence as to the trailing of defendant by dogs was admissible where it was shown that the person in charge of the dogs was engaged in the business of trailing persons with dogs; that the dogs used to trail defendant were trained to trail human beings; that one of them had had four years training; that the other had had experience also, and that the dogs had trailed sixty or seventy persons in the last four years.
2. *Same; Tracks.*—It being admitted that a certain pair of shoes belonged to the defendant, and that he wore them on the day of the night of the burglary, it was permissible to show that the shoes were obtained from defendant's house after his ar-

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rest, and that they were of the same length and width as the tracks found near the place where the burglary was committed.

3. *Same; Affirmative Instruction.*—Where the evidence affords an inference against defendant's innocence, he is not entitled to the general affirmative charge.

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

Defendant was tried and convicted of burglary. The facts are sufficiently stated in the opinion of the court.

M. K. CLEMENTS, for appellant.—The court erred in not excluding all the evidence in reference to trailing defendant with bloodhounds.—*Hodge v. State*, 98 Ala. 10; *Pedigo v. Commonwealth*, 42 L. R. A. 432. The court erred in refusing to give the general affirmative charge requested by appellant.—Authorities, *supra*.

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

DOWDELL, J.—The defendant was tried and convicted on an indictment charging him with the crime of burglary.

There are three questions presented for our consideration. The first is on the action of the trial court in overruling the motion of the defendant to exclude "all the evidence of the witness, Lee Davidson, in reference to alleged trailing of the defendant by the dogs." It was shown by this witness that he owned two bloodhounds, and "was in the business of running bloodhounds, and that the two dogs were trained to trail human beings. This witness further testified that one of the dogs had had four years' training, and that the other dog was two years old, "and had experience also," and that "these dogs had trailed 60 or 70 persons in the last four years." With this evidence as to the nature and training of the dogs, the testimony of this witness in reference to the trailing of the defendant by the dogs, was competent and admissible under the ruling in the case of *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17. See, also *Little v. State*, (Ala.) 39 South. 674.

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The second question is on the action of the court in overruling the defendant's motion to "exclude the evidence of the witness Labe Westmoreland in reference to the tracks." This witness testified "that he got a pair of shoes at the house of the defendant the night that the dogs went to the defendant's house, and after the defendant was arrested, and that some tracks that were found near Warten's store and near where the cash drawer was found, were the same length and width as the shoes found in the defendant's house." The witness further testified "that these shoes were put into the tracks found in the rear of Warten's lot, where the cash drawer was rifled, and they were the same length and width as these tracks." The defendant admitted, when being examined as a witness in his own behalf on the trial, that the shoes were his, and that he wore them on the day of the night of the burglary. The evidence as to the tracks was competent and relevant, and the court committed no error in overruling the motion to exclude. —Mayfield's Digest, vol. 1, § 421 1-2, p. 333.

The third question raised is based on the refusal of the court to give the general charge requested in writing to find in favor of the defendant. It has often been ruled by this court that the general affirmative charge cannot be given, when the evidence affords inference adverse to the party requesting the charge. In such a case the question becomes one for determination by the jury. The evidence in the case before us offered inference of the defendant's guilt, and the court, therefore, properly refused the charge. We find no error in the record and the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ.,
concur.

[Peck v. The State.]

Peck v. The State.*Burglary.*

(Decided June 30, 1906. 41 So. Rep. 759.)

1. *Burglary; Indictment; Sufficiency.*—The indictment charged that defendant, with intent to steal, broke into and entered a building, to wit, the depot of the Southern Ry. Co., etc., the said depot being the property of the Southern Ry. Co., a corporation. The demurrer raises the question of the proper averment of corporate character, in that the words "a corporation" do not follow the words "Southern Ry. Co.", where first used in the indictment. Held, the indictment sufficiently avers corporate character, the last clause therein supplying the omission in the first instance.
2. *Same; Ownership.*—Where the ownership of the building broken and entered is laid in the person having the possession and occupancy thereof, it is sufficient, in an indictment for burglary.
3. *Criminal Law; Appeal; Harmless Error.*—Possession being a collective fact to which a witness may testify, and it being shown that the building broken and entered was in the possession of the Southern Ry. Co., if it was error to permit parol evidence of the ownership of the building, it was error cured by § 4333, Code of 1896, and harmless.
4. *Same; Evidence; Confessions; Admissibility.*—The defendant, while in the custody of the arresting officer, was taken into a closed room by such officer and the justice issuing the warrant, just before entering into his preliminary examination, and asked by the justice a question which assumed defendant's guilt. The evidence further tended to show that defendant was a weak minded person, and began to cry when the question assuming his guilt was put to him. Held, that an alleged confession evoked in this manner was inadmissible, even though it was shown that no threats were made or promises given to induce same.

APPEAL from Hale Circuit Court.

Heard before Hon. B. M. MILLER.

The defendant was tried and convicted for burglarizing the depot of the Southern Railway. The facts are sufficiently stated in the opinion of the court.

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EDWARD DE GRAFFENREID and R. B. EVANS for appellant.—It is a familiar principle that if an indictment is unnecessarily particular in its averments the averments which are unnecessary must be proven as well as any other allegation.—A. & E. Ency. Law, p. 558. The testimony of the witness Otts shows that the statement of the defendant was not voluntarily made.—*Lacey v. State*, 58 Ala. 386; *Kelly v. State*, 72 Ala. 244.

The absence of proof tending to show the fact of the incorporation of the Southern Railway Company, entitled the defendant, to the affirmative charge. The statutes dispensing with this proof in this case is unconstitutional, and in its enactment the legislature went beyond its legitimate sphere.—*United States v. Klein*, 13 Wallace, 128.

MASSEY WILSON, Attorney General, for State.—The court properly overruled the demurrer to the indictment. The court properly permitted the witness Crawford to state whose property the building was and in whose possession it was.—*Forworth v. Brown*, 120 Ala. 59; *Wright v. State*, 136 Ala. 139; *Thomas v. State*, 97 Ala. 3; *Matthews v. State*, 55 Ala. 65; *Fuller v. State*, 117 Ala. 36; Code 1896, section 4333.

The confessions were clearly voluntary.—*White v. State*, 133 Ala. 122; *Bush v. State*, 136 Ala. 85.

It was not necessary to prove the incorporation of the Southern Railway.—Acts 1900-01, p. 2285; *State v. Thomas*, 40 So. Rep. 271; *Willis v. State*, 134 Ala. 429.

DOWDELL, J.—The demurrer to the indictment upon the ground that the indictment failed to charge that the Southern Railway Company was a corporation was without merit. The indictment charges that the defendant, "with the intent to steal broke into and entered a building, to wit, the depot of the Southern Railway Company, etc., the said depot being the property of the Southern Railway Company, a corporation." The point made by the demurrer is that the omission of the words "a corporation" after Southern Railway Com-

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pany, where first used in the indictment, was a failure to aver corporate character; but this omission was supplied in the clause that followed as set out above. The circuit court properly overruled the demurrer.

It is sufficient, in an indictment for burglary, to lay the ownership of the building broken into and entered in the person in the possession and occupancy of the building.—*Matthews v. State*, 55 Ala. 65; *Thomas v. State*, 97 Ala. 3, 12 South. 409. We need not consider whether there was error in admitting parol evidence of the ownership of the building entered, for, if error, it was error without injury, since it was proven that the depot building broken into and entered was in possession of the Southern Railway Company.—Code 1896, § 4333; *Fuller v. State*, 117 Ala. 36, 23 South. 688. Possession is a collective fact, to which a witness may testify.—*Wright v. State*, 136 Ala. 139, 34 South. 233.

The state was permitted to prove the confession of defendant against his objection. The confession sought to be proved was, under the decision of the case of *Kelly v. State*, 72 Ala. 244, inadmissible. The facts in the cases of *Bush v. State*, 136 Ala. 85, 33 South. 878, and *White v. State*, 133 Ala. 122, 32 South. 139, cited by the attorney general, are different from the case at bar, and clearly differentiate the former case from the latter. Here the facts show that the defendant, while a prisoner in the custody of the officer making the arrest, was taken by the justice of the peace who issued the warrant on which the arrest was made and the officer who made the arrest into a room, and the door closed, and, being thus alone with the prisoner, and just before entering upon his preliminary trial, the justice of the peace asked the defendant a question which assumed the defendant's guilt, and in this manner, the confession admitted in evidence on the trial was evoked. There was evidence tending to show that the defendant was a weak-minded person, and when the question was asked him which assumed his guilt "the defendant commenced crying and stated" (and here follows the confession). It was stated by the witness that no threats were made, nor promises,

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to induce the confession. The time, place, and surroundings of the prisoner, the manner of evoking the confession, and by whom evoked, in the very nature of things, were calculated to unduly influence the prisoner and render a confession under such circumstances inadmissible in evidence against him. And the mere fact that no threats were used or promises made to the defendant, and nothing more said to him than to ask the question which called for the confession, is not enough, under the facts in this case, to affirmatively show that the confession was voluntarily made.

In *McQueen v. State*, 94 Ala. 50, 10 South. 433, the confession of the defendant was made while under arrest, and to the officer in whose custody the defendant was; but the records show affirmatively that the confession was voluntary. The court said in that case: "It is affirmatively shown that the confessions were not made under the influence of threats, promises, or *other improper inducements*, but were voluntary. (The italics are ours). So, too, in the case of *Redd v. State*, 68 Ala. 492, the confessions, though made by the defendant to the officer and while in custody of the officer, appearing to have been voluntary, evidence of the confession was held to have been admissible. The principle held in this case was that the mere fact that the confession was made while in custody and in answer to questions asked by the officer is not alone sufficient to exclude the confession; the confession otherwise appearing to have been voluntary. In *Miller v. State*, 40 Ala. 54, it is said: "A confession is not inadmissible, as is contended because elicited in answer to a question which assumes a prisoner's guilt. The law seems to be well settled that this, of itself, would not be sufficient to authorize the exclusion of the confession."—citing *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282. But the judgment of the lower court was reversed for the error of admitting the confession on the facts in that case. The facts in the case of *Spicer v. State*, 69 Ala. 159, were different from the case at bar. There the confession was made to one who had been left by the

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officer temporarily in charge of the prisoner, and the confessions thus elicited by questions of such person. It was said by the court: "They [the confessions] are affirmatively shown not to have been elicited through the influence of either threats or promises, *or other improper appliances* [italics ours], and were therefore voluntary."

There can be no difference in principle between this case and the case of *Kelly v. State, supra*. There the prisoner was interrogated by the magistrate while the preliminary trial was in progress; here the prisoner was interrogated by the magistrate just before entering upon the preliminary trial. Every condition in the one case calculated to unduly influence the prisoner and render his confession involuntary exists in the other. The confession, we think, was evoked by the employment of improper appliances, and, on the authority of *Kelly v. State, supra*, should have been excluded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

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Embezzlement.

(Decided July 6, 1906. 41 So. Rep. 911.)

1. *Criminal Law; Record; Presence of Accused.*—Where it appears from the record that defendant was present in person and by counsel at the commencement of the trial, and it also appears that he was present at the time of pronouncing sentence, the record sufficiently shows his presence during the trial.
2. *Same; Arraignment.*—It is a sufficient arraignment, in a prosecution for embezzlement, that the solicitor read the indictment to the jury in the presence of the defendant and he interposed thereto his plea of not guilty.
3. *Indictment and Information; Variance.*—The indictment charged embezzlement of the funds of H. G. Kilgore. The evidence

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showed that the funds belonged to Howell Greene Kilgore, that Kilgore signed checks and transacted business as H. G. K. and that his initials were H. G. K. Held, not to constitute a variance.

4. *Same; Allegation and Proof.*—The indictment charges, in the first count, the embezzlement of “fifty dollars, lawful money of the United States of America” and in the second count “Money to the amount of fifty dollars.” There was no proof of the kind of money laid in the first count, and no allegation or proof that the property laid in the second count was of any value. Held, fatal to a judgment of conviction, and to entitle defendant to the affirmative charge.
5. *Embezzlement; Venue; Jury Question.*—Where the proof showed that the money was delivered to defendant in the county of C. to be deposited in a bank in the county of T. and part of such money was deposited in said bank, the trial court could not say, as a matter of law, that the embezzlement occurred in the county of C.
6. *Same; Common Carrier.*—The fact that defendant was accustomed to carry money for prosecutor from prosecutor’s place of business to a bank in another town for deposit, for which prosecutor paid defendant did not constitute defendant a common carrier, and a charge asserting that defendant was such a carrier was properly refused.

APPEAL from Coosa Circuit Court.

Heard before Hon. A. H. ALSTON.

The judgment of the court is as follows: “April 18, 1906. On this day came W. B. Bolling, solicitor of the Fifth judicial circuit of Alabama, and also comes the defendant in his own proper person and by his attorney, and being arraigned upon said indictment and for his plea thereto the defendant says that he is not guilty. Issue being joined upon said plea, and after hearing the evidence, thereupon came a jury, etc., who upon their oaths say: ‘We, the jury, find the defendant guilty as charged in the indictment.’ It is therefore considered and adjudged by the court that the defendant, Jim Knight, is guilty as charged in the indictment, and the State of Alabama, for the use of Coosa county, have and recover of Jim Knight the cost of this prosecution, for which let execution issue. Again, on this 18th day of April into open court comes the defendant, Jim Knight,

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in his own proper person. Being asked by the court if he has anything to say why the sentence of the law should not be pronounced upon him, says nothing. It is therefore considered," etc. The bill of exceptions contains the following: "The defendant was arraigned in the following manner: The state announced ready for trial, and the defendant announced ready for trial, and after the jury had been selected and impaneled, the solicitor read the indictment to the jury in the presence of the defendant, and the defendant's counsel announced to the jury in the presence of the defendant in open court that the defendant pleads not guilty. The defendant raised no objection to the manner of this arraignment, or any of the preliminary proceeding had in this cause." The evidence showed that Kilgore paid defendant 15 cents for taking \$163 for him from his place of business at Weogufka, in Coosa county, to the Merchants' & Planters' Bank at Sylacauga, in Talladega county, to the credit of Kilgore, and that he deposited only \$110 in money and a \$3 check. It further appeared from the evidence that the defendant was a mail carrier, and that he received from Kilgore compensation on several occasions for carrying money to Sylacauga and depositing it.

The court at the conclusion of the testimony gave the general affirmative charge to the state, and refused like charges for the defendant. Defendant also requested charges requiring the jury to believe that the offense was committed in Coosa county before conviction, and also charges requiring an acquittal of defendant if they had a reasonable doubt as to whether the crime was committed in Coosa or Talladega county. Charge 9 was as follows: "I charge you that if you believe from the evidence in this case that the defendant was in the habit and had been regularly engaged to carry money by Kilgore to the bank at Sylacauga and deposit it in Kilgore's name subject to draft, and that the money described in the indictment was delivered to him in this way and for this purpose, that the transaction would constitute the defendant a common carrier, and from the time the

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money was delivered to the defendant, to be delivered to the bank, the money was the property of the bank, and the defendant could not be convicted as charged in the indictment." This charge was refused.

D. H. RIDDLE, for appellant.—The indictment was defective.—*Berney v. State*, 87 Ala. 80; *State v. Murphy*, 6 Ala. 845; *DuBois v. State*, 50 Ala. 139; *Grant v. State*, 55 Ala. 291.

In all cases of felony the record should show that the defendant was arraigned. In this case, it is not sufficiently shown.—*Hughes v. State*, 1 Ala. 655; *Fernandez v. State*, 7 Ala. 511; *Paris v. State*, 36 Ala. 232; *Slocomb v. State*, 46 Ala. 227; *Jackson v. State*, 91 Ala. 55; 2 A. & E. Ency. P. & P. pp. 829 to 861. There was a variance in that the indictment charged the money to be the property of H. C. Kilgore and the proof showed it to be the property of Howell Kilgore; and it was not shown that they were the same people.—*Morningstar v. State*, 52 Ala. 405; *Johnston v. State*, 59 Ala. 37; *Underwood v. State*, 220.

There are three reasons why the affirmative charge should not have been given for the State but should have been given for the defendant. No value was shown. Embezzlement did not occur in Coosa county and it was a question for the jury to say where the fraudulent intent was conceived.—*Henderson v. State*, 129 Ala. 104; *Penny v. State*, 88 Ala. 105. The record fails affirmatively to show the presence of the accused during the trial.—*Sylvester v. State*, 71 Ala. 23.

MASSEY WILSON, Attorney General, for State.—The pass book was properly identified, and therefore, properly admitted, or if improperly admitted it was without error.—*Curtis v. Parker*, 136 Ala. 217; *Fuller v. State*, 117 Ala. 36; Sec. 4333, Code 1896. The court properly gave the affirmative charge for the State. The defendant waived his right to take advantage of any insufficiency in the indictment.—Sec. 4895, Code 1896; 10 Ency. P. & P. 564. The only way to take advantage

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of the insufficiency of the indictment after failure to demur is by writ of error.—*Raines v. State*, in MS. There is nothing in the contention that there was a variance.—*Crittenden v. State*, 134 Ala. 145. The presence of the defendant is sufficiently shown.—*Suddeth v. State*, 124 Ala. 32. The charges refused to the defendant were all properly refused. Charges 4 and 5 on the authority of *Crittenden v. State*, *supra*.

SIMPSON, J.—The defendant in this case was convicted under an indictment charging embezzlement. No demurrer was interposed to the indictment, nor any supposed defects brought to the attention of the court in any legal way.—Code 1896, § 4895; 10 Ency. Pl. & Pr. 564. The record sufficiently shows a continuous proceeding and the presence of the defendant throughout the trial.—*Sudduth v. State*, 124 Ala. 32, 27 South. 487. The arraignment is also sufficiently shown.—*Fernandez & White v. State*, 7 Ala. 511.

It is claimed that there is a variance between the allegations in the indictment and the proof, in that the indictment gives the name of the person whose money is alleged to have been embezzled as "H. G. Kilgore," while the proof shows his name was "Howell Green Kilgore." Kilgore testified himself that his name was H. G. Kilgore, and on cross-examination stated that his name was Howell Green Kilgore; that people called him "Howell"; that his initials were "H. G."; that he signed checks and received mail by that name; that people who knew his name called him "Howell," and those who did not called him "H. G."; and that his letterheads were printed "H. G. Kilgore." There was no dispute as to the identity of the party, and this court "is satisfied that no injury resulted therefrom to the defendant." This was not such a variance as to entitle the defendant to the general charge.—Code 1896, § 4333; *State v. Rook*, 42 Kan. 419, 22 Pac. 626; *State v. Flack*, 48 Kan. 146, 29 Pac. 571; *Franklin v. State*, 37 Tex. Cr. R. 312, 39 S. W. 680; *Thompson v. State*, 48 Ala. 165; *Franklin v. State*, 52 Ala. 414; *Lyon v. State*, 61 Ala. 224; *Lowe v. State*, 134 Ala. 154, 32 South. 273; *Crittenden v. State*, 134 Ala. 145, 32 South. 273.

[James Knight v. The State.]

The first count in the indictment alleges that the property embezzled was "fifty dollars, lawful money of the United States of America," and the second count alleges only that it was "money to the amount of fifty dollars." There was no proof to sustain the allegation in the first count, as to the kind of money; and there was no allegation in the second count, and no proof that the money therein referred to was of any value. These being the facts of the case, the court erred in giving the general charge in favor of the state.—*Burney v. State*, 87 Ala. 80, 6 South. 391. For another reason it was error to give the general charge for the state, to-wit: The evidence showed that the money was delivered to the defendant in Coosa county to be carried to Talladega, and that the money which he did deposit was carried to and deposited in the bank in Talladega county. The court could not say as a matter of law that the embezzlement took place in Coosa county.—*Henderson v. State*, 129 Ala. 104, 29 South. 799.

Without going specifically into an examination of each charge refused, it is sufficient to say, in connection with what has already been said, that in order to sustain a conviction in this case the burden was on the state to show that the property described in the indictment was embezzled in Coosa county. The facts detailed in the evidence did not constitute the defendant a common carrier, and the charge based on that theory was properly refused.

The judgment of the court is reversed and the cause remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ.,
concur.

[Hamilton v. The State.]

Hamilton v. The State.

Grand Larceny.

(Decided July 6, 1906. 41 So. Rep. 940.)

1. *Larceny; Indictment; Description of Property.*—An indictment, the first count of which alleges the taking of two twenty dollar bank bills, and one dollar bank bill, lawful money of the United States of America; and the second count of which alleges the taking of two twenty dollar national bank notes and one one dollar national bank note, lawful money of the "U. S. A.", and the third count of which describes the property taken as two twenty dollar United States treasury notes, and one one dollar United States treasury notes, lawful money of the "U. S. A.", is not demurrable for failing to sufficiently describe the property alleged to have been taken.
2. *Criminal Law; Evidence; Confessions; Admissibility.*—Although the accused was in the custody of the sheriff, confessions made while so in custody were admissible where it is shown that no threat was made or any reward or inducement offered to obtain them.
3. *Criminal Law; Instructions; Credibility of Witnesses.*—Instructions asserting that if the witnesses testifying to the crime were in the opinion of the jury unreliable, and not worthy of belief, the accused could not be convicted are properly refused, as premitting corroboration by other evidence.
4. *Same.*—A witness may swear falsely to a material fact unintentionally, hence a charge which asserts that if any witness was shown to have sworn falsely to any material fact, his testimony might be disregarded, was properly refused.
5. *Larceny; Trial; Instructions.*—Instructions hypothesizing the description of the property as alleged in a count of the indictment, and requiring that the defendant could not be convicted unless the proof showed that the money stolen was this certain kind of money, were improperly refused.
6. *Criminal Law; Plea of Not Guilty.*—A trial on its merits cannot be entered into until the defendant has pleaded not guilty, or that plea has been entered for him by the court, and this fact must affirmatively appear of record before a conviction can be had, Section 5262, Code 1896.

APPEAL from Walker Law and Equity Court.
Heard before Hon. THOMAS L. SOWELL.

[Hamilton v. The State.]

The indictment in this case charged that Lula Hamilton and Letha White feloniously took and carried away certain money, the personal property of J. V. Ledbetter. In the first count the money is described as "two twenty dollar bank bills, and one one dollar bank bill, lawful money of the United States of America;" in the second, as "two twenty dollar national bank notes, and one one dollar national bank note, lawful money of the U. S. A."; in the third, as "two twenty dollar United States Treasury notes, and one one dollar United States Treasury note, lawful money of the U. S. A." Demurrers were interposed to each of the counts because the same failed to sufficiently describe the property alleged to have been stolen, and because it fails to sufficiently describe the person from whom the property is alleged to have been stolen. The demurrers were overruled. On the trial, after proof had been made that certain money had been stolen from one Ledbetter, the person described in the indictment, the state introduced J. S. Moore, who testified as follows: "I know the defendant. She was turned out of jail about 12 o'clock on the day that Ledbetter claims he lost his money. She was put back in jail in the evening about 4 o'clock, but not on the charge of taking Ledbetter's money. I got sixteen dollars and some few cents off of her. We found two five dollar bills of money in her hair." The solicitor then asked the witness whether defendant made any statement to him or in his presence about getting the money, and witness answered she did. Solicitor then asked witness if he or any one in his presence made any threat or offered any inducement to get defendant to make this statement. Witness answered "No." The solicitor asked the witness this question: "State, Mr. Moore, if she denied getting the money off of Ledbetter." The defendant objected to this question and asked permission to cross-examine the witness before he was allowed to answer. This was granted defendant, and in answer to the cross-examination witness testified as follows: "I told her that she had to give up the money, she had it, and there was no use to deny it. I was the sheriff at that time and

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had her in jail in my custody." Here the solicitor repeated the question to the witness: "State whether or not defendant told you that she had taken the money." Witness answered she told me that she got the money from Mr. Ledbetter. There was objection to the question and answer and motion to exclude upon the grounds that it was a confession coming from the defendant, who was then incarcerated under the witness, who was sheriff of Walker county at that time, and the proper predicate had not been laid. The defendant requested a number of written charges which were refused, and which are as follows: "(a) The court charges the jury that, unless the money stolen be shown to have been all or part of it bank bill or bank bills, you cannot find the defendant guilty on the first count in this indictment. (b) The court charges the jury that the defendant cannot be convicted under the second count of the indictment unless the proof shows that the money stolen was either all or a part of it national bank note. (c) The court charges the jury that the defendant cannot be convicted under the third count of this indictment unless the proof shows that the money stolen or a part of it was United States Treasury notes. (5) If the witnesses testifying to the theft are, in the opinion of the jury, unreliable and not worthy of belief, you cannot convict the defendant. (6) The court charges you, gentlemen of the jury, that, if any witness is shown to have sworn falsely to any material fact in the case, you have a right to disregard the testimony of such witness as though he had never testified.

RAY & LEITH, for appellant.—The court erred in overruling the demurrer to the second and third counts.—*Culp v. State*, 1 Port. 33. The court erred in permitting testimony as to the confessions of the defendant.—*McAlpine v. State*, 117 Ala. 93; *Horn v. State*, 102 Ala. 144; *Bradford v. State*, 104 Ala. 68; 83 Ala. 3; 84 Ala. 426. The court erred in its oral charge to the jury.—*Horn v. State*, *supra*. The court erred in refusing to give defendant's requested charges.—*Gilmore v. State*, 99

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Ala. 154; *Morris v. State*, 97 Ala. 82; *McGehee v. State*, 52 Ala. 225; *Felix v. State*, 18 Ala. 720; 2nd Fed. Stat. Ann. pp. 366-371.

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

DENSON, J.—Each count of the indictment is sufficiently specific in the description of the property alleged to have been stolen, and shows by the direct averment that it was lawful money of the United States.—*Grant's Case*, 55 Ala. 201; *Turner's Case*, 124 Ala. 59, 27 South. 272. The demurrer to the indictment was properly overruled.

The confession of the defendant was properly admitted as evidence.—*Spicer's Case*, 69 Ala. 159.

Charges (a), (b), and (c) hypothesize the description of the property as alleged in the first, second, and third counts of the indictment, respectively, and should have been given. Charge 5 was properly refused, if for no other reason, it pretermits corroboration of the witness of the class named by other evidence in the case.—*Frost's Case*, 124 Ala. 71, 27 South. 550; *Churchwell's Case*, 117 Ala. 124, 23 South. 72; *Osborn's Case*, 125 Ala. 106, 27 South. 758. Charge 6 was properly refused. A witness may unintentionally swear falsely to a material fact.—*Prater's Case*, 107 Ala. 26, 18 South. 238. It is not necessary to notice the other written charges refused to defendant.

“The record fails to show that the defendant pleaded to the indictment, or, standing mute, the court caused the plea of not guilty to be entered for him.—Code 1896, § 5262. There can be no trial on the merits in a criminal case until the defendant has pleaded not guilty, or this plea has been entered for him by the court.”—*Jackson's Case*, 91 Ala. 55, 8 South. 773, 24 Am. St. Rep. 860.—*Powell v. Henry & Co.*, 96 Ala. 412, 11 South. 311.

For the errors pointed out the judgment must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur.

[Burrow v. The State.]

Burrow v. The State.*Burglary.*

(Decided June 30, 1906. 41 So. Rep. 987.)

1. *Burglary; Plea; Corporate Capacity; Proof.*—In the absence of a plea denying the existence of the corporation, it was unnecessary, under Acts 1900-1, p. 2285, to prove incorporation, on a charge of burglarizing a railroad car, the property of the Southern Ry. Co., a corporation.
2. *Indictment; Designation of Person Owning Property.*—A count of an indictment charging grand larceny, which lays the ownership of the property in the So. Ry. Co., but failed to allege that it was a corporation, partnership or person, is fatally defective.
3. *Criminal Law; Indictment; Counts; Verdict.*—Where an indictment contained a count for burglary, and one for grand larceny, which latter count is defective, and a verdict was rendered finding the defendant guilty on both counts, and he was sentenced only for burglary, he was not prejudiced by the defects in the second count.
4. *Burglary; Railroad Cars; Ownership.*—The ownership of the car was properly laid in the Southern Ry. Co., which company at the time of the alleged burglary was using the car for the transportation of freight, although the car belonged to the Illinois Central.

APPEAL from Cleburne County Court.

Heard before Hon. T. A. JOHNSON.

The defendant was tried and convicted of burglary from a railroad car. The facts are stated in the opinion.

BURTON & McMAHAN, for appellant.—Counsel discussed the proper construction of the various acts in reference to the removal of the court from Edwardsville to Heflin but cite no authorities.

There is a fatal variance between the proof and the allegation as to the ownership of the car alleged to have been broken.—*Johnson v. State*, 98 Ala. 57.

MASSEY WILSON, Attorney General, for State.—The petition for the removal of the county seat, the order for

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the election, the appointment of the board of commissioners of election, and the holding of the election and declaration of the result were all in accordance with the statute and this court was properly held at Heflin.—*Jackson v. State*, 102 Ala. 76; *Joiner v. Winston*, 68 Ala. 129; *Chamblee v. Cole*, 128 Ala. 649; *Goodwater Co. v. Street*, 137 Ala. 621; *State v. Johnson*, 16 So. Rep. 786; *Davis v. State*, 141 Ala. 84; 15 Cyc. 387; 10 A. & E. Ency. of Law, pp. 761-763. There was no variance between the proof and the allegation of the indictment as to the ownership of the car.—*Johnson v. State*, 73 Ala. 485; *Johnson v. State*, 111 Ala. 66; *Allen v. State*, 134 Ala. 159; *Viberg v. State*, 138 Ala. 100; 5 A. & E. Ency. of Law, p. 530; 20 Ib. 80; 23 Ib. 731.

DENSON, J.—The indictment as returned by the grand jury contained three counts. On motion of the defendant the third count was stricken. The first count charges burglary of a railroad car, the property of the Southern Railway Company, a corporation under the law of the state of Virginia, and in all essential particulars the count is sufficient.—Code 1896, § 4418. No plea denying the existence of the corporation was filed. Hence there was no necessity for proving the incorporation as alleged.—Acts of 1900-01, p. 2285. The second count attempts to charge grand larceny. The ownership of the property is laid in the Southern Railway Company, but there is no averment in this count that it is a corporation, a partnership, or a natural person. On the reason employed in the case of *Emmonds v. State*, 87 Ala. 12, 6 South. 54, and on the authority of that case, it must be held that the count is insufficient with respect of the allegation of ownership of the property alleged to have been stolen. But this will not work a reversal of the judgment; for, while the verdict of the jury finds the defendant guilty on the first and second counts, and the judgment of the conviction follows the verdict, yet the record affirmatively shows that the defendant was sentenced only for the offense of burglary. We are therefore able to say that we are satisfied that no injury

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resulted to the defendant on account of this defective count and the finding of the jury on it.—Code 1896, § 4333.

The evidence showed without conflict that, while the car burglarized was “an Illinois Central Railroad car,” it was in use by the Southern Railway Company for the transportation of freight. The goods that were in the car at the time had been brought in the car by the Southern Railway Company over its line to Heflin, the point where the burglary was committed, and the car was in that company’s undisputed possession, on its tracks at the time. Under these facts the ownership was properly laid in the Southern Railway Company.—*Matthews’ Case*, 55 Ala. 65, 28 Am. Rep. 698; *Allen’s Case*, 134 Ala. 159, 32 South. 318. The case of *Johnson v. State*, 111 Ala. 66, 20 South. 590, is not in conflict with the views expressed above, but the opinion in that case sustains the conclusion here reached. In that case the ownership was averred as being in the Alabama Mineral Railroad Company, a corporation, and the evidence upon which the opinion was based showed neither property, general or special, in, nor possession of, the car in the Alabama Mineral Railroad Company.

All other questions presented by this record are settled adversely to the defendant in the cases of *Ex parte Bud Owens*, 42 South. 676 and *Burgess v. State*, (at present term) 42 South. 681.

No error has been found in the record, and the judgment appealed from is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

[Davis v. The State.]

Davis v. The State.*Gaming.*

(Decided June 14, 1906. 41 So. Rep. 404.)

Gaming; Offense; Public Place; What Constitutes.—Any playing with cards or dice in or sufficiently near a public highway for the playing to be seen therefrom is within the statute. Playing done which might be seen by a careful observer from the highway, although a casual observer might not see it, is sufficient to constitute the offense.

APPEAL from Dale Circuit Court.

Heard before Hon. A. A. EVANS.

This was a charge of betting or playing a game of cards in a public place. The defendant requested the following written charges, which were refused by the court: "(1) The jury must not convict because the defendant could be seen from the road. The card playing and betting must be seen to constitute the offense, and if the defendant, in betting at cards, could not be seen on an ordinary observation from the public road, then they must find for the defendant. (2) The playing and betting at cards must have been of such character and under such circumstances as to be seen on ordinary observation from the public road before the jury can convict the defendant. (3) The jury must believe beyond a reasonable doubt that the defendant was betting and, that the defendant could be seen playing at cards on reasonable observation from the public road."

H. L. MARTIN, for appellant.—The facts did not make out a case denounced by the statute and charges 1 and 2, as well as charge 3 should have been given.—*Smith v. State*, 23 Ala. 42; *Franklin v. State*, 91 Ala. 23.

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

TYSON, J.—The testimony on behalf of the state tended to show that defendant, with others, bet on a

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game played with cards in the daytime within 15 steps of a public road, and that they could be and were seen by the witnesses, while in the public road, who testified to these facts. The testimony in behalf of defendant tended to show that he, and those with him, were not playing any game, that there was no betting, and that, if they had been playing, it could not have been seen from the public road.

One of the essential elements of the offense necessary to be established to the satisfaction of the jury by that degree of proof required in criminal cases, it is apparent, is whether the place as testified to by the state's witnesses was a public one. The charges refused to defendant proceed upon the theory that it was not, if the game and betting on it could not be seen by ordinary observation from the public road. In other words, although the game and betting may have been seen by a careful observer traveling along the road, and not seen by one less observant, the place would not be a public one. We do not think this is the law. The rule is that any playing with cards, etc., in or sufficiently near a highway for the playing to be seen therefrom, is within the statute.—*Franklin v. State*, 91 Ala. 23, 8 South. 678, and cases there cited.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Bradford v. The State.

Gaming.

(Decided June 30, 1906. 41 So. Rep. 1024.)

1. *Criminal Law; Appeal; Review; Finding by Court.*—Although the act conferring on the County Court of Lawrence County, jurisdiction of misdemeanor does not authorize this court to review the conclusions of the Judge on the evidence in cases

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tried without a jury, where there is no conflict in the evidence, the action of the court in applying the law to the facts will be reviewed.

2. *Gaming; Prosecution; Burden of Proof.*—In a prosecution for betting at a game of cards in a public place, it is on the state to show beyond a reasonable doubt that the place was a public one.
3. *Witnesses; Cross Examination; Knowledge of Witness.*—Witnesses having testified that they did not think the place where the game was played could be seen from a certain public road, it was proper for the solicitor on cross examination, to ask the witness if they could say that the playing at the place could not be seen from any point along the public road.
4. *Gaming; Prosecution; Evidence; Sufficiency.*—Where it appeared that the playing was done at night in a patch of woods about 150 feet from a church where religious services were going on, and about the same distance from the public road; and it further appeared that it could not be seen from the church, and the witnesses did not think it could be seen from the public road, although they could not say that it could not be seen from any point on the road; and it further appeared that the place was not frequented for the purpose of gambling, and that the game stopped as soon as two or three persons from the church, who were attracted by the light of the fire, came up, such evidence was insufficient to show that the place was a public one.

APPEAL from Lawrence County Court.

Heard before Hon. J. C. KUMPE.

The defendant was tried and convicted for playing a game of cards or dice in a public place. The facts are sufficiently stated in the opinion of the court.

G. O. CHENAULT, for appellant.—(No brief came to the Reporter.)

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

DOWDELL, J.—The defendant was tried and convicted by the county court of Lawrence county on an indictment for betting at a game played with cards in a public place. The indictment was found by the grand jury

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at the Spring term, 1905, of the circuit court of Lawrence county, and was by that court transferred to the county court under the statute. The trial was by the court without a jury.

Neither the act approved February 6, 1891, nor the act amendatory thereof, approved February 10, 1899 (Acts 1898-99, p. 836), conferring jurisdiction in such cases on the county court, authorizes us to review the conclusions of the judge of that court on the evidence adduced before him in the trial of a case without a jury. But, as was said in the case of *Giles v. State*, 88 Ala. 230, 67 South. 271: "If, however, the facts put in evidence in a given case, or in respect to a particular matter, before the judge of that court, are free from conflict, and do not admit of adverse inferences or deductions, the action of the court in applying the law to those facts will be reviewed. In such case, the matter revised is a conclusion of law from undisputed facts, and not the finding of fact from the evidence adduced on the trial."—*Skinner v. State*, 87 Ala. 105, 6 South. 399; *Hardy v. Ingram*, 84 Ala. 544, 4 South. 372; *Boyd v. State*, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31. Under the indictment in this case, the burden was on the state to prove beyond a reasonable doubt that the place at which the alleged playing occurred was a public place. The evidence showed without conflict that the playing was done at night in the woods about 150 yards from a church where religious exercises were going on, and about the same distance from a public road. The evidence further showed that there were trees and bushes between the church and the place of playing, and so as to the public road; and furthermore, that the place could not be seen from the church. The defendant and only one other was engaged in the game, and no one else was present. The place was not one frequented for the purpose of gaming, and this was the only time that the defendant had ever played cards at that place. Three or four persons were attracted and drawn from the church by the light from the fire, which the defendant and his companions had made for the purpose of playing, and

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when these persons came upon the scene the game stopped, and was not afterwards engaged in. There was no evidence that the place could be seen from the public road. Witnesses testified that they did not think it could be seen from the public road. But, the court permitted the state, against the objection of the defendant, to ask the witnesses if they could testify that the playing at that place could not be seen from any point along the public road, to which interrogatory they each answered in the negative. It may be that this question was permissible, and doubtless was, in view of the statement by the witness, that he did not think the place could be seen, but alone and of itself, it was insufficient to show that the place of playing cards could be seen from any point along the public road. This was negative evidence without any affirmative tendency. It was not enough to afford a reasonable inference of the existence of a fact in issue, and which it was incumbent upon the state to establish beyond a reasonable doubt, before a conclusion of the defendant's guilt could be reached.

We are of the opinion that on the undisputed evidence the question is one of law, and that the court erred in the judgment rendered.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ.,
concur.

Wester v. The State.

Selling Choking Horse.

(Decided June 30, 1907. 41 So. Rep. 969.)

1. *Constitutional Law; Police Power; Fraud.*—Section 4762 of Code of 1896 is not violative of the constitutional guaranty to every person of the right to enjoy, use, and dispose of his property, it being for the prevention of fraud and a proper exercise of the police power.

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2. *Indictment; Fraud; Elements of Offense.*—The purpose of Section 4762, Code of 1896, being the prevention of fraud, an indictment thereunder should allege that the sale was made or the exchange had with intent to defraud.

APPEAL from Cherokee Circuit Court.

Heard before Hon. W. W. HARALSON.

Defendant was indicted and tried for selling or trading a horse commonly called a "choker." The pleadings and the facts of the case are sufficiently stated in the opinion of the court.

C. DANIEL and H. H. WHITE, for appellant.—The statute under which this indictment is drawn is unconstitutional.—*DeArman v. State*, 34 Ala. 239. The uncontroverted evidence shows that the disease of choking is not a contagious disease, and hence, does not fall within the police powers of the State.—*Chicago v. Netcher*, (Ill.) 75 Am. St. Rep. 93. The indictment is fatally defective in not charging the defendant with selling the horse with intent to injure or defraud.—*Ben v. State*, 22 Ala. 9; *Miles v. State*, 94 Ala. 106; *Stein v. State*, 37 Ala. 123; *Grattan v. State*, 71 Ala. 344; *Rivers v. State*, 97 Ala. 72.

The court erred in refusing to give charges 1, 2, and 3.—Authorities supra.

MASSEY WILSON, Attorney General, for State.—(No brief came to the Reporter.)

DOWDELL, J.—The indictment in this case was preferred under section 4762 of the Criminal Code of 1896. This section is as follows: "Any person, by himself, or another, or as agent for another, who shall knowingly sell or exchange any horse or mule subject to the disease or affection known as 'choking' must, on conviction, be fined not less than one hundred, nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not less than three, nor more than six months; one-half of the fine shall go to the party injured. For each conviction under this section, the solicitor shall

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be entitled to a fee of fifty dollars. Justices of the peace shall have concurrent jurisdiction with the circuit and city court of offenses arising under this section."

The indictment in terms pursued the language employed in the statute, without averment, in charging the offense; that is to say, it merely charged that the defendant "knowingly sold to R. F. Ewing a mule subject to the disease or affection known as 'choking.'"

There are two questions presented by the record for our consideration, the first going to the constitutionality of the statute, and the second to the sufficiency of the indictment in its averments. It is insisted by counsel for appellant that the statute is violative of the constitutional guarantee that gives every person the right to enjoy, use, and dispose of his property. If the statute were nothing more than an arbitrary prohibition on the sale by one of his property, then there would be no doubt as to its being unconstitutional, and without legislative competency. We recognize and approve what was said in *Dorman v. State*, 34 Ala. 239, cited by counsel. It is not here denied that the legislature may, in the proper exercise of the police power of the state, regulate or prohibit the sale of personal property when the morals, health, or general welfare of the people require it. But, it is insisted that inasmuch as the undisputed evidence shows that the disease or affection known as "choking" is not a contagious disease, there is no room for the exercise of the police power of the state so as to save the statute from offending against the constitutional right of the citizen in the guaranteed enjoyment, use and disposition of his property. In this insistence, the room for the exercise of the state's police power is made too narrow and circumscribed. Certainly it is as much within the police power to prevent imposition and fraud in the sale of personal property as it is to regulate or prevent the sale of animals infected with contagious disease. If the purpose of the statute in question was the prevention of fraud, then it was clearly within legislative competency as an exercise of the state's police power, and not violative of any constitutional right of the citizen. Was this the purpose of the statute?

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The statute in question, section 4762, is found in chapter 154 of the Code of 1896, the subject of which chapter is "Frauds." Article 2 of said chapter and which includes section 4762 is headed "Fraudulent conveyances and illegal disposition of property on which another has a claim." Section 4762 was brought forward from the Criminal Code of 1886, in which latter Code it is to be found as section 3839. It appears that this section 3839 of the Code of 1886 was added by the joint committee, as shown by marginal note, and in this way became a law at the time of the adoption of the Code of 1886. In that Code the section is found in article 6 of chapter 4, which has for its subject "Fraudulent Conveyances," etc. We think from the history of the statute, the mode and manner in which it was adopted into the Code, that the manifest purpose in the enactment of the law was the prevention of fraud. This being true, from what we have above said, the statute as an exercise of the police power of the state is free from constitutional objections.

This brings us to a consideration of the second question; that is, as to the sufficiency of averments in the indictment. The general rule is that it is sufficient in making a criminal charge to follow the words of the statute which declares the offense, but this rule does not apply when the statute does not prescribe with definiteness the constituents of the offense. The defendant has the constitutional right to demand the nature and cause of his accusation, so that he may identify the particular charge and offense.—Mayfield's Dig. § 421 et seq., pp. 445, 446. The purpose of the statute being the prevention of fraud, fraud becomes a constituent element of the offense. The indictment, therefore, was defective in failing to aver that the offense charged was committed with the intent to defraud. The demurrer to the indictment should have been sustained. For the error committed by the trial court in overruling the demurrer, the judgment appealed from must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON, TYSON, and ANDERSON, JJ., concur. SIMPSON and DENSON, JJ., dissent.

[Z. Cross v. The State.]

Z. Cross v. The State.*Trespass After Warning.*

(Decided June 30, 1906. 41 So. Rep. 875.)

1. *Highways; Public Lands; Prescription.*—Under Rev. Stat. U. S. § 2477 (U. S. Comp. St. 1906, p. 1567) a roadway used by the public over public lands for 20 years does not become a public highway by user or prescription, the use being presumed to be permissive, and not adverse to the government.
2. *Trespass; Offense; Evidence.*—The fact that the prosecutor agreed with a third person on the day of the alleged trespass after warning that prosecutor was leaving the road open until it was determined whether or not he had the right to close it, was inadmissible as offering no defense or excuse for a trespass by defendant.
3. *Same.*—The fact that prosecutor gave another permission to haul lumber over this road after he had warned defendant not to trespass on it, was immaterial as furnishing no excuse or defense to defendant's trespass.
4. *Highways; Establishment; Mode.*—A highway becomes such only by dedication, prescription, or proper proceedings before and by the courts of County Commissioners or Boards of Revenue.
5. *Witnesses; Bias.*—It was competent, on cross examination of defendant, to show that he had sworn out a warrant for prosecutor's arrest, as bearing upon defendant's bias.
7. *Criminal Law; Trial; Order of Proof.*—It is within the discretion of the court to permit a witness, over defendant's objection, to be re-examined in rebuttal.
8. *Same; Evidence; Competency Established by Admission of Other Evidence.*—Where it was shown by defendant that the roadway in question was the only way of reaching the railroad station from defendant's saw mill, it was competent to permit evidence that prosecutor, after closing old way, cut a new way which was used by people to reach points to which the old roadway led.
9. *Same; Instructions; Exceptions.*—Exception taken to an uncompleted sentence of the court's oral charge is not available on appeal.

APPEAL from Bessemer City Court.
Heard before Hon. WM. JACKSON.

[Z. Cross v. The State.]

The prosecution was begun by warrant and affidavit. The facts sufficiently appear in the opinion. The court in its oral charge said: "Evidence upon the part of the state shows defendant on the 8th day of August passing along on the property of Vandeford." There was objection to this statement. Further charging the jury orally, the court said: "I charge you as a matter of law that there are only three ways in Alabama to establish a public road; that one is by board of revenue or county commissioners, one by dedication, and one by prescription. A public road must be a road either authorized by board of revenue or county commissioners and to establish it the law requires an application must be made to the board of commissioners. Such application must be made by petition and at least 30 days' notice of the intended application must be given by advertisement at the courthouse door and at three other places in the county, two of which should be in the immediate neighborhood of the place where road is to be established. The court must then issue a notice to seven disinterested householders of the county to view out the road and mark out the route for such proposed road and assess the value of the lands of the landowners; then mark out the route of the road and return their report to the court under oath, and a day is set for the hearing of the same; or a public road may be dedicated by the owner of the land through which it passes; or by prescription—prescription is the claim or title to the land or road by virtue of immemorial use or enjoyment—the right of title acquired by possession during the time and in the manner fixed by law." Further charging the jury orally, the court said: "I charge you, regarding the United States statute law, that the statute only gives permission, and it is only permission by the government, to enter on public land to establish a highway; but before it becomes a public road the state law would have to be applied, and before it could become a public road the state authorities would have to take hold of it and make it a public road according to the law of the state." The jury retired and returned and stated

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to the court that they desired instructions on one point in the case—if the continued use of the road 20 years or more by the people would make it a public highway over the public land. The court replied: "I charge you as a matter of law that under the United States statute a road used for 20 years or more while the land belonged to the government or was a part of our public domain would not make it a public road, unless it was so made by the laws of Alabama, and that it must be established by the laws of the state of Alabama and authorized in this way or it could not be a public road." Exceptions were reserved by the defendant to all these instructions. At the request of the state, the court gave the following written charge: "The court charges the jury that under the undisputed evidence in this case they should convict the defendant, unless they are reasonably satisfied that he had a legal cause or good excuse for entering upon the premises of Vandeford at the time for which he is prosecuted." A number of charges were requested by the defendant, and refused, which are not necessary here to be set out.

PINKNEY SCOTT, for appellant.—Counsel discussed assignments of error relative to the admission of testimony but cites no authorities.

The court erred in its oral charge in stating to the jury the tendencies of the State's evidence.—*McIntosh v. State*, 140 Ala. 137. The Court erred in its oral charge to the jury as to how a road may become established.—*Haincsworth v. State*, 136 Ala. 19. The court erred in its oral charge to the jury with reference to the United States statute authorizing the establishment of public highways across public lands.—*Smith v. Mitchell*, 21 Wash. 536; *Walloway Co. v. Wade*, 43 Oregon, 253. Sec. 2477 Fed. Stat. Vol. 6, p. 498, and cases cited in notes thereto.

Our laws recognize prescription as one of the modes of establishing a public highway.—*McDade v. State*, 95 Ala. 28; *Western Ry. of Ala. v. Ala. Gt. R. R. Co.*, 96 Ala. 272. The right to acquire a highway under a Fed. Statute has been declared to exist in this State.—*Tenn.*

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R. R. Co. v. Taylor, 102 Ala. 224. Under the above authorities the charges given to the State and the charges refused to the defendant were erroneous.

MASSEY WILSON, Attorney-General, for State.—Sec. 5602 of the Code does not relieve defendant of guilt in this case. Witness Greene was rightfully permitted to testify that a certain person was in possession of the land.—*Wright v. State*, 136 Ala. 139. It was discretionary with the court to permit a re-examination of Greene.—*Braham v. State*, 38 So. 919. The portion of the oral charge excepted to is a part of an incomplete sentence and cannot, for that reason, be reviewed.—*McNeil v. State*, 102 Ala. 121. The portion of the oral charge in reference to the creation of public highways was correct.—*Harper v. State*, 109 Ala. 66; *Leirman v. Andrews*, 129 Ala. 170. Section 2443, et. seq., Code 1896. The evidence showed that no acceptance of the grant by the government had been made by the State or County of the roadway over the public lands.—*Streeter v. Stallmaker*, 61 Neb. 205; *Rolen v. Emrich*, 99 N. W. 464; *Schwerdtle v. Placer County*, 108 Cal. 589; *Keene v. Fairview*, 8 S. Dak. 558; 9 A. & E. Ency. of Law, 72. Charges refused to the defendant were rightly refused. The excuse attempted to be set up in this case was not sufficient under the statute.—*Wilson v. State*, 87 Ala. 117.

DOWDELL, J.—The prosecution in this case was commenced on affidavit and warrant, in which the defendant was charged with trespass after warning. The evidence without dispute showed that the prosecutor, Vandeford, was the owner and in possession of the land at the time of the alleged trespass, and that he had warned the defendant prior to the alleged trespass and within six months not to go upon the land. The land was entered by the prosecutor as a homestead, the same being government land, six years prior to the alleged trespass, and the prosecutor had built upon and improved the same and perfected his right of entry in 1904. While the land was yet government land, a roadway traversed the same, which had been used and traveled by the people of

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the vicinity for more than 20 years. It was not shown to have ever been recognized by any act of the county as a public highway. Did it become one by its being used and traveled by the people of the vicinity and the public generally for more than 20 years? We think not. Such use will be presumed to have been permissive, and not adverse to the government. The federal statute (section 2477 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1567), which provides that "the right of way for the construction of highways over public lands not reserved for public uses, is hereby granted." cannot be construed to mean that a roadway used by the public over government land may become a public highway from mere user or by prescription. The purpose of this statute is to authorize the construction of highways over public lands not reserved for public uses, by authority of law; that is, by the laws of the state or territory in which the lands are situated.

There was no error in the court's ruling on the objections to the questions asked the witness Vandeford by the defendant on cross-examination, in which it was sought to be shown that the prosecutor agreed with one Russell, on the morning of the 8th day of August, 1905, the day of the alleged trespass, that he (the prosecutor) would leave the road open until it was settled whether he had the right to close it or not. It was not pretended that any such understanding or agreement was made with the defendant, and it certainly furnishes the defendant no legal cause or good excuse for going upon the prosecutor's land after he had been warned not to do so. There was no error in refusing to allow the defendant to prove that the prosecutor told the witness J. H. Russell, in the presence of Tom Russell and others, on the 19th day of August, that he had agreed to leave the road open until that day. The fact that the prosecutor gave Charlie Sellers permission to use and haul lumber over the road furnished no excuse to the defendant for going upon the land after he had been warned not to do so.

There was evidence on the part of the defense tending to show that the old roadway in question was the only

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way of reaching Kimbell, a station on the railroad, from the defendant's sawmill. This evidence being offered by the defendant, it was not error to permit the state to show by the prosecutor that, when he closed up the old roadway, he cut a new roadway, which could be and was used by people to reach the points to which the old roadway led. It is not reversible error to permit immaterial evidence to be rebutted by immaterial evidence.

There was no error in allowing the state, on the cross-examination of the defendant as a witness, to show that he (the defendant) had sworn out a warrant for the arrest of the prosecutor. This evidence was competent for the purpose of showing bias or feeling on the part of the witness.

There was no error in allowing, against the objection of the defendant, the re-examination of the witness Green in the rebuttal. This was a matter in the discretion of the court and is not revisable.—*Braham v. State*, (Ala.) 38 South. 919.

The first exception reserved to a part of the oral charge of the court to the jury, as set forth on page 19 of the record, shows that the portion excepted to is a part of an uncompleted sentence. We are unable to review this part so excepted to, for the reason that we are unable to say, in the absence of the omitted part of the sentence, what was the statement of the law by the court to the jury.—*McNeill v. State*, 102 Ala. 121, 15 South. 352, 48 Am. St. Rep. 17.

The court, in its oral charge as to what was necessary to establish a public road or highway, correctly stated the law.—*Harper v. State*, 109 Ala. 66, 19 South. 901; *Lewman v. Andrews*, 129 Ala. 170, 29 South. 692; Code 1896, § 2443.

On the undisputed evidence in this case the court committed no error in giving the general charge at the request of the solicitor. The court's action in refusing the several written charges requested by the defendant was free from error.—*Wilson v. State*, 87 Ala. 117, 6 South. 394.

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We find no error in the record of which the appellant can complain, or that is injurious to the appellant, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

Taylor v. The State.

Failure to Work Public Road.

(Decided July 6, 1906. 41 So. Rep. 776.)

1. *Highways; Work on Public Roads; Temporary Absence.*—One temporarily sojourning at the place where he is warned to work the public road, but who lives elsewhere, and has paid his street tax, is not liable to road duty at the place of his temporary sojourn.
2. *Same; Failure to Work; Evidence.*—It was competent for defendant to show that he was at the place where he was warned to work the road only temporarily working out a fine and cost his employe paid for him, that his home was elsewhere to which he would return on completing his fine and costs, and that he had paid his street tax to a certain date at the place of his residence, as a defense to a prosecution for failure to work the public road after warning.
3. *Same; Road Duty; Liability.*—The payment of street tax in an incorporated town or city is in substitution for road duty, and a person cannot be made liable for both for the same period.

APPEAL from Hale County Court.

Heard before Hon. W. C. CHRISTIAN.

Defendant was tried and convicted for failure to work the roads. Defense endeavored to be interposed by the defendant was that he lived in the town of Greensboro, and had paid street tax to said town for the year ending March 1, 1906. That he was out of town temporarily, working for one Otts who had secured a fine and costs for

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him, and that as soon as said fine and costs were fully paid, it was his intention to return to his home in Greensboro. These facts were offered to be shown by the witness Otts, but on motion of the solicitor, the court refused to permit the introduction of the testimony.

DE GRAFFENRIED & EVANS, for appellant.—No brief came to the Reporter.

MASSEY WILSON, Attorney-General, for State.—The demurrer to the indictment was properly overruled.—*Brown v. State*, 63 Ala. 97. The testimony for the State tended to show everything necessary to warrant a verdict of guilty.—Sections 2452-53, Code 1896. The exceptions to the finding of the Court are unavailing.—*Witherspoon v. State*, 39 So. Rep. 352.

SIMPSON, J.—The defendant in this case was tried by the court without a jury, and found guilty of the offense of willfully failing or refusing to work the public road after legal notice, as charged in the indictment.

The court erred in sustaining the objection to the question by the defendant to the witness Otts, and in refusing to allow proof by said witness of the facts proposed. If the defendant was a resident of an incorporated town, where he was paying his street tax, and only temporarily in the country for the purpose of working out his fine or indebtedness, with the intention of then returning and continuing his residence in said town, he was not liable to road duty at the place of his temporary sojourn.—*Spann v. State*, 14 Ala. 588. The facts sought to be proved were proper to be considered in order to determine whether or not he was simply a sojourner.

The motion to discharge the defendant should have been granted. The payment of street tax in an incorporated town or city is a substitute for the performance of road duty, and it is not the intention of the law that a man shall be liable to both for the same period. The evidence is uncontroverted that the defendant had paid his street tax in and for the year, which did not end until

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March 1, 1906, and he was warned on February 1, 1906, to work the road on February 5, 1906. He could not be made liable for road duty until March 1, 1906.

As the defendant is entitled to be discharged, it is not necessary to pass on the demurrer to the indictment.

The judgment of the court is reversed, and a judgment will be here rendered discharging the defendant.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

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Failure to Work Public Road.

(Decided June 30th, 1906. 41 So. Rep. 677.)

Indictment and Information; Issues; Variance; Matters Unknown to Grand Jury.—While § 4901, Code 1896, dispenses with the necessity of laying the precise time, in the indictment, of the commission of an offense, where an indictment charges an offense to have been committed in a certain month, and proof is offered by the State of an offense committed at another time, defendant is entitled to show that, as to such offense, there was no evidence before the grand jury that returned the indictment.

APPEAL from Hale County Court.

Heard before Hon. W. C. CHRISTIAN.

Defendant was indicted, tried and convicted for the offense of failing to work the public roads. The testimony showed that in 1902 and 1903 the defendant was apportioned to a certain road. The solicitor was permitted to ask the witness over the objection of defendant, "did you in Nov. 1902, warn the defendant to work the public road. The witness answered, "I gave the defendant three days warning to work the road telling him where to meet me. I warned him on Monday to work on

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Friday. He did not come. The defendant moved to exclude the answer of witness on the grounds that the grand jury had indicted the defendant for an offense alleged to have been committed in March 1903, and asked the court to limit the testimony to the offense charged in the indictment. The court overruled the objection and refused to limit the testimony. The defendant offered to prove that the grand jury which found the indictment on which defendant was being tried had before it no testimony as to any offense committed by defendant except in March 1903. The court refused to permit this testimony. It was shown that the road overseer on the 24th day of March 1903 returned a complaint against defendant for failure to work the road, and that this was the only complaint returned against him. In his argument to the jury, the solicitor said: "If the defendant had worked ten days in 1902, he would have told you about it." The defendant objected to this statement and moved to exclude it. The court overruled the objection and defendant excepted. The defendant requested the following written charges. 1. The court charges the jury that if they believe the evidence in this case, beyond a reasonable doubt, they must acquit the defendant. 2. Unless the jury are satisfied from the evidence in this case beyond a reasonable doubt, that the defendant was indicted by the grand jury for a wilful refusal or failure, to work the public road in October or November 1902, they must acquit the defendant.

DE GRAFFENRIED & EVINS, for appellant.—The indictment was defective in failing to allege the particular road the defendant was in default for failure to work.—*McCollough v. State*, 63 Ala. 75. Where there is no evidence before the grand jury returning the bill for indictment, as to the offense charged the indictment will be quashed.—*Washington v. State*, 63 Ala. 189; *Sparrenberger's case*, 53 Ala. 481.

MASSEY WILSON, Attorney-General, for State.—The demurrer was properly overruled.—*Brown v. State*, 63

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Ala. 97. The trial court could not inquire into the proceedings of the grand jury in the manner here attempted.—*Sparrenberger v. State*, 53 Ala. 48; *Jones v. State*, 81 Ala. 79; *Hall v. State*, 134 Ala. 90. The defendant having assigned one ground for the motion, this was a waiver of all other grounds.—*McDaniel v. State*, 97 Ala. 14. The bill of exceptions shows merely that the defendant objected and excepted to the remarks of counsel. This presents nothing for review.—*Stone v. State*, 105 Ala. 60; *King v. State*, 100 Ala. 85. The charges refused to the defendant were bad.—*Owen v. State*, 74 Ala. 401.

ANDERSON, J.—While the statute (section 4901 of the Code of 1896) dispenses with the necessity for stating the precise time at which the offense was committed, the law requires that all indictments must be found on legal evidence, and when an indictment charges an offense, it means the one testified to before the grand jury, and not one that may have been committed by the defendant at some other time, and which was not considered by the grand jury. While the indictment in the case at bar did not have to aver the precise time the offense was committed, it did charge the defendant with the commission of the offense (meaning, of course, the one testified to before the grand jury), and the law does not authorize the conviction for an offense which was never thought of nor considered by that body.

The question involved in this case is not one which attacks the indictment, but is really one of *allegata* and *probata*. The indictment must of necessity charge the defendant with the commission of the offense as disclosed by legal evidence before the grand jury, and the state is not authorized to prove an offense different from the one for which the defendant was indicted, although similar in its character. If, therefore, there were two separate and distinct offenses on the part of the defendant, the state could ask for a conviction only for the one for which he was indicted, being the one considered by the grand jury; and, after proving the other default, the defendant had the right to show that it was not the one for which he was indicted. We do not concede that such

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evidence is violative of public policy, because permitting proof of what transpired before the grand jury, as defendants have been permitted in other instances to show certain facts presented to the grand jury. For instance when the indictment avers a fact "unknown," the defendant has the right to show that it was known. But public policy cannot be considered when to do so would interfere with the constitutional right of a citizen. When a person is tried and convicted for an offense different from the one charged in the indictment, he has been denied his constitutional right. The case of *O'Brien v. State*, 91 Ala. 25, 8 South. 560, is not in conflict with this opinion. There the attempt was to show that certain witnesses testified to different offenses from the one for which the defendant was tried; but the defendant did not attempt to show that the indictment under which he was being tried was not found on legal evidence. Nor is the case of *Sullivan v. State*, 68 Ala. 525, in conflict with this opinion. There the defendant was tried under an affidavit.

It is contended that, if a defendant be permitted to go behind an indictment upon the trial, it will lead to much confusion and embarrassment in the administration of the criminal law. If such be true, we cannot subordinate the constitutional rights of the most obscure citizen to an expedition of trials. There can be little cause, however, for a resort by the defendant to evidence of this character, when the state only attempts to convict a defendant of the offense for which he has been indicted.

So much of the argument of the solicitor as was objected to was improper; but whether the defendant took the proper action to eliminate it or not we need not decide, as this case must be reversed for the reason above indicated.

The trial court committed no error upon the other rulings. The judgment of the county court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

[Stewart v. The State.]

Stewart v. The State.*Killing Animals.*

(Decided June 14, 1906. 41 So. Rep. 631.)

1. *Criminal Law; Verdict; Polling Jury.*—Either party has the right to poll the jury in a criminal case.
2. *Same; Waiver.*—The accused may waive the right to poll the jury in a misdemeanor case.
3. *Same; Irregularity in Verdict.*—The jury, while the court was recessed, made their verdict, wrote it upon the indictment and handed it to the clerk of the court and dispersed; when the court reconvened the judge refused to receive the verdict and sent the jury to their room to make a verdict. All this was done without the consent of the defendant. Held, that as the judge refused to receive the verdict made and returned during the recess of the court, the dispersing of the jury did not amount to an acquittal, but was such an irregularity as rendered the verdict a nullity and it would not support a judgment of conviction.

APPEAL from Dale Circuit Court.

Heard before Hon. A. A. EVANS.

The defendant was indicted and tried for unlawfully or wantonly killing, disfiguring, or disabling a hog, the property of another, of the value of \$15. The bill of exceptions states that the case was tried during the morning session of the court, and after the evidence was all in, and the attorneys had addressed the jury, and the judge had charged them, and the jury had retired to consider their verdict, the court recessed for dinner; that no agreement was made between the solicitor and the defendant, or his attorney, that the verdict of the jury, when found, could be received by the clerk in the absence of the defendant and the court; that while the court was at recess the jury found a verdict and wrote the same upon the indictment and returned to the courtroom, in the absence of the court and the defendant, and delivered to the clerk of the court their verdict, which the clerk

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placed with the file. Thereupon the jury dispersed. Upon the reconvening of the court for the afternoon session, the clerk handed the verdict of the jury to the judge, presiding, who from the bench read the verdict aloud. The judge then caused said jury to take their place in the jury box, and asked the jury what they meant by this verdict. The verdict was as follows: "We, the jury, find for the defendant and assess the value of the hog at \$6." The defendant objected to this question, assigning his grounds that the verdict of the jury had been returned to the clerk of the court as their verdict, and without the consent of the defendant or his counsel they had dispersed and gone to their homes, and that there was no consent on the part of the defendant or his counsel that the verdict might be put in form, and that by dispersing after rendering verdict they had done an act tantamount to an acquittal. The objection was overruled, and the foreman of the jury answered the court that the jury meant to find the defendant guilty and assess the damages at \$6. The court explained to the jury how to put their verdict in form to express what they intended, and that the law required that, if they found the defendant guilty, they should assess a fine against the defendant in double the amount they found the value of the property to be. The defendant objected to this, and excepted. The jury retired, and returned a verdict in conformity to the instructions of the court, and the court proceeded to pronounce judgment of guilt upon the verdict last returned.

SOLLIE & KIRKLAND, for appellant.—The defendant should have been discharged under the facts in this case, after the separation of the jury.—*Jones v. State*, 97 Ala. 77; *Foster v. State*, 88 Ala. 182; *Hayes v. State*, 107 Ala. 4; *State v. Hughes*, 2 Ala. 104; *Cook v. State*, 60 Ala. 39; *Waller v. State*, 40 Ala. 332; *Jackson v. State*, 102 Ala. 76; *McCawley v. State*, 26 Ala. 135; *Cobia v. State*, 16 Ala. 748; *Ned v. State*, 7 Port. 187; *Brown v. State*, 63 Ala. 104.

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MASSEY WILSON, Attorney-General, for State. No brief came to the reporter.

ANDERSON, J.—In all criminal cases, whether of felony or misdemeanor, the right of polling the jury is secured to either party. It is a right, however, like the right of trial by jury, which may be waived by the prisoner in case of misdemeanor.—*Brown v. State*, 63 Ala. 97. The return of a verdict in the absence of the defendant and a dispersion of the jury is irregular, and would operate as a reversal of the case, unless it was a misdemeanor and it appeared that the defendant had consented to such a return.—*Jones v. State*, 97 Ala. 77, 12 South. 274, 38 Am. St. Rep. 150; *Wells v. State*, 147 Ala. 41 South. 630. If the verdict is not received and recorded, it would not result in an acquittal of the defendant, and the unauthorized dispersion of the jury would be good ground for a new trial and for a reversal by this court when the point is properly reserved.—*Jones' Case, supra*; *Hayes v. State*, 107 Ala. 1, 18 18 South. 172.

In the case at bar, the verdict was not received and accepted or recorded by the court, and did not work an acquittal; but, as the jury had dispersed before returning the verdict that was received, said verdict would not support a valid judgment of conviction, and the trial court erred in rendering judgment thereon over the objection of the defendant. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

[Wells v. The State.]

Wells v. The State.*Disturbing Religious Worship.*

(Decided June 6, 1906. 41 So. Rep. 630.)

1. *Criminal Law; Verdict; Rendition; Presence of Accused.*—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and in the presence of the accused.
2. *Same; Felonies; Records.*—The record must affirmatively show the personal presence of accused when the verdict is rendered, in all cases of felony.
3. *Same; Reception of Verdict; Recess.*—It is error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused, even with the consent of his counsel.
4. *Same; Acquittal.*—In a misdemeanor or felony case, where the verdict is received and the jury discharged in the absence of accused, such proceedings operated as an acquittal of the accused, and cannot be cured by reassembling the jury, after they have dispersed.
5. *Same; Waiver; Misdemeanors.*—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused.

APPEAL from Madison County Court.

Heard before Hon. W. T. Lawler.

The defendant was indicted at the February term, 1905, of the Madison Circuit court for disturbing an an assemblage of people met for a religious worship. The case was returnable to the county court of said Madison county and was tried. The facts are sufficiently stated, and it is admitted that these are the facts, in the following motion made by defendant: "Comes the defendant, John Wells, and moves the court to discharge him from custody for the following reasons: On August 5, 1905, after that a jury had been impaneled and sworn and accepted by both the state and the defendant, and after that the indictment had been read to the jury and the defendant had pleaded not guilty, and after that the evidence

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had been taken in the cause, attorneys had made their arguments, and the court had charged the jury and directed that they retire to deliberate upon the verdict, the hour of 12:30 having arrived, the court recessed until 2 o'clock. In the meantime the defendant and other persons who were in the courtroom who desired to do so had left the courtroom to get their dinners. The jury came into the courtroom with a verdict, which they sealed in an envelope and handed to the judge, which was by him handed to the clerk. When the verdict was handed to the judge, he instructed the jury not to make known the contents of the verdict, and told them to go to their dinners, and report back at 2 p. m. In a half hour after this the judge handed the verdict to the clerk. The defendant objected and excepted to this conduct of the court. The jury then dispersed. Various ones went to their dinners separately and mingled with the people generally. After court was convened at the hour of 2 o'clock the defendant moved the court by his attorney to discharge him on the ground that he had been acquitted; the jury having been allowed to separate without having returned a verdict into court in his presence." The defendant had not consented for the jury to be discharged in his absence. The court overruled defendant's motion to discharge him, and he duly excepted. After this motion was made, at the suggestion of the solicitor, the court called the jury from the audience, as they were not then sitting in the jury box, but were sitting promiscuously with the audience in the courtroom before him, and caused the clerk to take the verdict which had been handed to him quite a while before that and read in their presence. The jury said that that was their verdict, and each one of them said he had not talked about the verdict that had been rendered before any one. The defendant objected to this examination of the jury, and the court overruled his objections and permitted the solicitor to prove by the jurors that they had not talked about the verdict that had been rendered. The defendant moved to exclude the evidence of the jurors that they had not talked about the verdict, and the court overruled the motion, and the de-

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defendant excepted. John Hertzler, one of the jurors testified that the verdict had been agreed upon before they had separated. The defendant objected to this and moved to exclude it.

D. A. GRAYSON and C. A. GRAYSON, for appellant.—The unauthorized discharge of the jury before the verdict was received entitles the defendant to his discharge.—*Ned v. State*, 7 Port. 187; *Hayes v. State*, 107 Ala. 1; 4 Blacks. Com. 360; 17 A. & E. Ency of Law, p. 1251. Under the evidence, the defendant was entitled to the affirmative charge.—*Adair v. State*, 32 So. Rep. 326. The court erred in calling the jury together and having the verdict read over the defendant's objection.—*Cook v. State*, 60 Ala. 39. On the same authority, the court erred in permitting proof by the jurors as to how and when their verdict was made.

MASSEY WILSON, Attorney-General, for State.—No brief came to the reporter.

ANDERSON, J.—In all criminal cases the verdict of the jury must be rendered in open court and in the presence of the accused. In cases of felony the prisoner must be personally present when the jury return their verdict, and to support a conviction the record must affirmatively declare his presence.—*Hughes' case*, 2 Ala. 102, 36 Am. Dec. 411; *Eliza's Case*, 39 Ala. 693; *Waller's Case*, 40 Ala. 326. And in a case of felony it is error to allow the verdict to be received by the clerk during a recess of the court in the absence of the prisoner, even though this be done with the consent of his counsel.—*Waller's Case*, *supra*. It would seem that when the verdict has been received in the absence of the defendant, and the jury is discharged, it is the equivalent of an acquittal.—*Hayes v. State*, 107 Ala. 1, 18 South. 172; *Ned v. State*, 7 Port. 187; *Cook v. State*, 60 Ala. 39. 31 Am. Rep. 31. The action of the court in reconvening the jury after the defendant appeared in court and after they had dispersed, but before having the verdict read, did not cure the error.

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The foregoing rule relates to the trials of misdemeanors, as well as felonies, except the defendant may waive the right to be present when the verdict is returned and other formalities connected with the return and reception thereof in misdemeanor cases.—*Brown v. State*, 63 Ala. 97. But in the case at bar the record affirmatively shows that the defendant did not consent to an informal return and reception of the verdict, and as the verdict was illegally received, it operated as a discharge of the defendant. The judgment of the county court is reversed and one is here rendered discharging the defendant.

Reversed and rendered.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

Lynch v. The State.

Selling Liquor Without License.

(Decided Jan. 10, 1906. 39 So. Rep. 912.)

Intoxicating Liquors; Licenses; Issuance to Firm; Rights of Partner.—The defendant having purchased his partner's interest in the firm, was authorized to carry on the same business under the license granted to him and his partner to retail liquors.

APPEAL from Bessemer City Court.

Heard before Hon. WILLIAM JACKSON.

The defendant was convicted of retailing without a license. Trial was had on the following agreed statements of facts: That one D. B. Wilkins and Will Lynch, the defendant in the case, paid for and procured a license, both state and county, to carry on business as retail liquor dealers in the city of Bessemer, Jefferson county, Ala. That the said D. B. Wilkins and Will Lynch were understood to be, and were, partners in said business,

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and that they did business under the firm name of Wilkins & Lynch. That the license that was issued to them had their names written in it as follows: "D. B. Wilkins and Will Lynch." That they commenced to do business on the date that the license was issued for the balance of the year 1905. That the said firm did business as the firm for some time, when the said D. B. Wilkins sold and transferred his interest in and to said business to W. R. McVay, and he (Wilkins) went out of and left the business. That the said McVay never took charge of nor attempted to do business under said license, but at once after the transfer of Wilkins' interest to him transferred the same to Will Lynch, this defendant. That this defendant, Will Lynch, continued to carry on and run said business without other license than that issued to D. B. Wilkins and Will Lynch as aforesaid. That this prosecution is brought against said Lynch for carrying on said retail liquor business aforesaid after Wilkins had retired from the firm as aforesaid.

W. S. WELCH, for appellant.—It being admitted that Wilkins and Lynch had a valid license, it is prima facie presumed that the law has been complied with in its procurement.—*Russell v. State*, 77 Ala. 89. Each member of a firm must qualify as required by law before license will issue, so then each member is qualified and authorized to retail in the same place.—§§ 3520-24, code 1896 and citations; *Long v. State*, 97 Ala. 32; *Shaw v. State*, 56 Ind. 188; *Lovejoy v. Commonwealth*, 13 Ky. Law Rep. 967. The word, person or party means firm as well.—22 A. & E. Ency. of Law, pp. 233-738. A license to a firm will protect each member thereof.—*Shiff v. State*, 84 Ala. 454. Where a retail license has been issued to a firm and one of the members buys out the other, the license protects the remaining partner in selling at the same place, and during the time for which it was issued.—*Commonwealth v. James*, 98 Ky. 30; *Hill v. Thirton*, 94 Ky. 96; *State v. Gearhardt*, 3 Jones L. 178; *U. S. v. Gladden*, 99 U. S. 225; *James v. Commonwealth*, 16 Ky. Law, 445; *U. S. v. Davis*, 37 Fed. 468; *St. Charles*

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v. Hackman, 133 Mo. 645; *Hickley v. Insurance Co.*, 140 Mass. 38.

MASSEY WILSON, Attorney General, for the State.—The court correctly gave the affirmative charge for the State. A license to one partner conferred no authority on the partner or a partnership.—*Long v. State*, 27 Ala. 32; *Stallings v. Lee*, 123 Ala. 464. The acts of Lynch can, in no sense, be the acts of the partnership, and the license to the partnership was a personal permit or privilege to be exercised in the manner and by the persons to whom it was granted.—*Powell v. State*, 69 Ala. 10; *Wharton v. King*, 69 Ala. 365. Charge A, requested by defendant was properly refused.—*Townsend v. State*, 137 Ala. 91. As the affirmative charge was properly given for the state, the refusal of charges to the defendant was without error.—*Parrish v. State*, 139 Ala. 16.

ANDERSON, J.—Although it is in general permissible to grant a license to two persons jointly, yet a license granted to one person, who forms a partnership with an unlicensed person, does not authorize the latter to make sales.—*Shaw v. State*, 56 Ind. 188. And when the firm already exists, a license to one partner individually will confer no authority on his partner or the firm. "A license to retail affords protection only for those acts which, by law, are merely acts of an individual. If it is granted to a partnership, it affords protection only for those acts which, in law, are the acts of the firm. A license to an individual cannot be a license to a partnership." *Long v. State*, 27 Ala. 32. And on the same principle a license issued to a firm, of which a given person is a member, confers no authority to sell on another firm, of which, also, the same person is a member.—*Wharton v. King*, 69 Ala. 365. "But where a license is issued to a firm, and before its expiration one partner acquires the interest of the other partners in the firm's business and property, he may continue to sell under the same license; and so, also, a license granted to two persons or partners will justify one of them in making sales, although the other has retired from the

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firm."—*Black on Intoxicating Liquors*, § 134; *U. S. v. Davis*, (D. C.) 37 Fed. 468; *State v. Gerhardt*, 48 N. C. 179; *Hill v. Thixton*, 94 Ky. 96, 23 S. W. 947; *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878.

In the case at bar the license was granted to D. B. Wilkins and Will Lynch, the defendant, who were at the time partners, and at the time of the alleged violations the said Lynch was conducting the business as the sole owner and proprietor. The North Carolina case, *supra*, very justly holds "that the continuance of the business by the remaining partner will not authorize an improper person to retail, because the moral qualifications of the retailer have already been examined into and passed upon by the county court. In this respect it differs essentially from the case of an assignee, or of the personal representative of a licensed person, claiming the right to sell under the license. Such claim would be rejected, for the obvious reason that the claimant would not have the sanction of the county court. But the reason would not apply to the case of the present defendant, who is a remaining partner." The trial court erred in giving the general charge for the state, and in refusing the one requested by the defendant; and the judgment is reversed and one will be here rendered discharging the defendant.

Reversed and rendered.

HARALSON, TYSON, DOWDELL, and DENSON, JJ., concur.

Halney v. The State.

Carrying Concealed Weapon.

(Decided June 30th, 1906. 41 So. Rep. 968.)

1. *Carrying Concealed Weapon; Jury Question.*—Whether the pistol was carried in such manner as not to be discernible by ordinary observation is a question for the jury.
2. *Same; Evidence; Admissibility.*—It was error to admit evidence

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that defendant was drunk at the time it was alleged he carried a concealed pistol.

3. *Same.*—It was inadmissible to show that the accused was a brother of a person whom the officers were seeking to arrest for drunkenness at the time the accused is alleged to have carried the concealed weapon.
4. *Criminal Law; Instruction; Repetition.*—It is not error to refuse instruction covered by those given in writing at the request of defendant.

APPEAL from Jackson Circuit Court.

Heard before HON. W. W. HARALSON.

The state was permitted to prove, over the objection of defendant, that at the time of the carrying, the defendant was drunk or under the influence of whiskey. The state was also allowed to prove that Sam Hailey and the defendant were brothers, and that Sam Hailey was drunk also, and that the defendant stopped the marshal and his assistant while in the discharge of their duty in carrying Sam Hailey, under arrest, to town.

LAWRENCE E. BROWN, for appellant.—The court improperly permitted proof that the defendant was under the influence of liquor, or drunk at the time of the alleged carrying.—*Gainey v. State*, 141 Ala. 74; *Barney v. State*, 69 Ala. 233. The court also erred in permitting testimony as to the condition of defendant's brother.—Authorities supra; *Wisdon v. State*, 8 Port 511; *Campbell v. State*, 23 Ala. 69. The court erred in refusing charge 1.—*Smith v. State*, 96 Ala. 66; *Ramsey v. State*, 91 Ala. 31; *Perry v. State*, 78 Ala. 22; *Sullivan v. State*, 68 Ala. 525.

MASSEY WILSON, Attorney General, for State.—Under the evidence the jury could come to no other conclusion, except the guilt of the defendant, and as the defendant received the lowest term, it is evident that the admission of the testimony objected to was not prejudicial to the defendant; besides, the specific grounds of objection did not reach the error in the admission of the evidence.—*Ellis v. State*, 105 Ala. 76. The request to give the

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charges were general.—*Yeates v. State*, 38 So. 760. Charge 1 was misleading.—*Driggers v. State*, 123 Ala. 46.

DENSON, J.—The defendant was convicted for carrying a pistol concealed about his person.

The defendant offered no evidence, and the point in the case on its merits was whether the pistol, which the testimony showed the defendant had, was carried in such manner as not to be discernable by ordinary observation; and this was a jury question.—*Smith's Case*, 96 Ala. 66, 11 South. 71; *Ramsey's Case*, 91 Ala. 29, 8 South. 568; *Drigger's Case*, 123 Ala. 426, 26 South. 512.

Evidence that the defendant was drunk at the time the state's witness testified he saw him with the pistol, was not an issuable fact in the case, and was patently immaterial. Its only tendency was to unduly prejudice the jury against the defendant. The court erred in admitting it.—*Dean's Case*, 98 Ala. 71, 13 South. 318; *Gainey's Case*, 141 Ala. 74, 37 South. 355. We cannot say that the admission of the evidence was not injurious to the defendant's case, as has been suggested by the attorney general in his brief. What the state's witness was doing at the time he saw the defendant with the pistol may have been competent as tending to show that he was, or was not, in a position to see the defendant and the pistol, and the court properly overruled the objection calling for such evidence. But the witness's answer was not entirely responsive to the question, and those parts of it that defendant moved to exclude should have been excluded.

Nor have we been able to discover the materiality of the evidence of the relationship between Dick and Sam Hainey. Neither was examined as a witness, and whether they were brothers or otherwise related, or not related at all, had no tendency to elucidate any issue in the case.

The defendant had the benefit of charges 1 and 4 refused to him in other charges given at his request.

[Roland v. The State.]

For the errors pointed out, the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ.,
concur.

Roland v. The State.

Selling Liquor Without License.

(Decided June 30th, 1906. 41 So. Rep. 963.)

1. *Criminal Law; Affidavit; Wrongful Sale of Liquor.*—Under the provisions of Section 3, of Acts of 1896-7, p. 124, the clerk of the circuit court, who is ex-officio clerk of the county court of Shelby county, has authority to take affidavit as the basis for a warrant in a prosecution for violation of the liquor laws.
2. *Same; Lost Affidavit; Substitution.*—The county court has power to substitute an affidavit which has been lost, and on which a prosecution for the illegal sale of liquor was based.
3. *Same; Trial; Warrant.*—The fact that several terms of the court had elapsed since the issuance of the warrant, and that the warrant was functus officio, did not affect the court's power to try the defendant where the defendant was properly before the court.

APPEAL from Shelby County Court.

Heard before HON. A. P. LONGSHORE.

The defendant was convicted of selling liquor without license. The facts sufficiently appear in the opinion of the court.

MCMILLAN & HAYES, for appellant.—In support of the position taken that the court was without authority to substitute an affidavit for the lost affidavit, we cite the following cases.—*Ganaway v. State*, 22 Ala. 773; *Bradford v. State*, 54 Ala. 230; § 4919-4392, code 1896; § 4920, code 1896. The warrant was functus officio.

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MASSEY WILSON, Attorney General, and J. T. LEEPER, County Solicitor, for State.—The court had authority to substitute the lost affidavit.—*Bradford v. State*, 54 Ala. 230; *Ward v. State*, 78 Ala. 455.

DENSON, J.—This prosecution was commenced in the county court of Shelby county by affidavit made by Dave Harper before J. P. Pearson, clerk of the circuit court, and ex-officio clerk of the county court of Shelby county in which the defendant was charged with the offense of selling vinous, spirituous, or malt liquors without a license and contrary to law. The authority of the clerk to take the affidavit exists under the third section of the act to regulate the trial of misdemeanors in Shelby county, approved December 9, 1896, Acts 1896-97, p. 124. The case was tried before the judge without a jury, and the appeal is prosecuted from the judgment of the court convicting the defendant.—Acts 1896-97, p. 123.

At the trial, and when the case was called, the solicitor made known to the court that the affidavit was lost, and motion to substitute a copy of the affidavit for the original was granted by the court. To the motion to substitute a demurrer was overruled. The demurrer proceeds upon the theory that the court was without authority to substitute a lost affidavit in a criminal case. It was held in *Ganaway's Case* by a divided court that a lost indictment could not be substituted. The court there recognized the right inherent in the court to substitute any part of the record which has been lost or destroyed in civil cases, but held that the rule did not apply to indictments. The conclusion there reached was based principally upon the proposition that the statutes of jeofails and amendments, which, in general terms, authorize corrections and amendments in process and pleadings, did not apply to indictments.—*Ganaway's Case*, 22 Ala. 772. That case was tried at the February term, 1852, of the city court of Mobile, and presumably before the adoption of the code of 1852, as no notice was taken in the opinion of the court of the statute providing for the substitution of lost indictments which is section 3527 of the code of 1852, and section 4919 of the code of 1896.—*Bradford's Case*, 54 Ala. 230.

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The contention of the defendant, appellant here, is that the statute with respect to the substitution of a lost indictment has no application to affidavits, and this contention may be conceded on the maxim, "inclusio unius est exclusio alterius." But this court has expressly held that an affidavit upon which a criminal prosecution is based, like an information at common law, is amendable at the instance of the state, and without the consent, or even against the objection of the defendant.—*Simpson's Case*, 111 Ala. 6, 20 South. 572; *Gandy's Case*, 81 Ala. 68, 1 South. 35. So it would seem, that the theory upon which the majority opinion in the *Ganaway Case* proceeded does not obtain in the case at bar. We are satisfied that it is within the inherent power of the county court to allow the substitution of a lost affidavit, and that there is no error in the action of the court in substituting the affidavit in this case.—*Bradford's Case*, 54 Ala. 230. It can make no difference, so far as the trial is concerned, whether the warrant was functus officio or not, the purpose of issuing the warrant was to get the defendant before the court, he was present, and the trial could properly proceed without regard to the fact that several terms of the court had elapsed since the issuance of the warrant. The affidavit was the paper upon which the trial was had, it was that which afforded the defendant information as to the charge made against him. There is no merit in the insistence that the court erred in denying the motion to quash the warrant.—*Murphy's Case*, 55 Ala. 252; *Clayton's Case*, 122 Ala. 91, 26 South. 118.

The witnesses were examined ore tenus, and we do not feel that we would be warranted in disturbing the conclusion reached by the court as to the defendant's guilt.—*Woodrow v. Hawring*, 105 Ala. 240, 16 South. 720.

There is no error, and the judgment is affirmed.
Affirmed.

WEAKLEY, C. J., and HARALSON and SIMSON, JJ., concur.

[Ossie v. The State.]

Ossie v. The State.*Habeas Corpus.*

(Decided June 6th, 1906. 41 So. Rep. 945.)

1. *Convicts; Contracts of Hire; Powers to Annul.*—If the convicts are cruelly treated, or if the bond of the hirer is insufficient or deemed so, however the information is obtained, the Judge of Probate may, under Section 4526, Code of 1896, of his own motion, annul contracts for the hire of county convicts, whether hired inside or out of the county.
2. *Same; Annuling Contract for Insufficiency of Bond.*—The present state of insecurity for the future, will justify the annulment of the contract of hire on account of the insufficiency of the hirer's bond, and the annulment is not confined to the fact of a change in the sufficiency of the bond from what it was when originally made.
3. *Habeas Corpus; Scope of Inquiry.*—The inquiry in habeas corpus proceedings is as to the unlawfulness of the detention—the status of the petitioner at the time of the trial—so that changes in the condition of detention between the time the writ was allowed and the time the trial was had formed part of the inquiry, and are to be considered in the decision.
4. *Same; Relief.*—The contract having been annulled before the term of petitioner's sentence had expired, the order in habeas corpus should not be an absolute discharge; the order should be a discharge from the custody of the hirer and a remandment to the custody of the jailer until further disposition can be made.

APPEAL from Jefferson Criminal Court.

Heard before HON. S. L. WEAVER.

Habeas corpus proceedings by Charles Ossie. From an order denying discharge, petitioner appeals.

GEORGE J. SULLIVAN and CHARLES L. BROMBERG, for appellant.—Habeas corpus is the remedy to procure the discharge of a citizen illegally restrained.—§§ 4812, 4834, 4838 and 4839, code, 1896; *Ex parte McKivitt*, 55 Ala. 238; *Simmons v. Ga. I. & C. Co.*, 61 L. R. A. 739.

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The action of the board of revenue and road commissioners of Mobile county in awarding the contract under which appellant was held, was null and void.—*Wightman v. Karsner*, 20 Ala. 446; *Cullom v. Casey*, 1 Ala. 351; *Davis v. State*, 46 Ala. 80; *Carlic v. Dunn*, 42 Ala. 404; *Ex parte Branch Bank*, 63 Ala. 383; *Jackson v. State*, 102 Ala. 76; *Birmingham B. & L. Asso. v. State*, 120 Ala. 408; *Boynnton v. Wilson*, 46 Ala. 501.

The corporation must show a legal contract with Mobile county for the hire of its convicts, and the records of the commissioners' court must show jurisdiction affirmatively.—§§ 4435, 4521, code 1896; *Ex parte Shortridge*, 115 Ala. 126; *Commissioner's Court v. Hearne*, 59 Ala. 471; *Cramblee v. Cole*, 128 Ala. 649. It, therefore, became necessary to show that the contract was made at a term authorized by law.—Authorities *supra*. Under the authority given Holcombe as shown by the record, he could not execute this contract.—§ 4535, code 1896; *Ex parte Shortridge*, *supra*; *Ex parte Haralson*, 123 Ala. 89. The bond which the corporation failed to give was for the purpose of protecting the convict against inhuman treatment.—*Jefferson Co. v. Truss*, 85 Ala. 486; *Arrington v. Morgan*, 75 Ala. 606. The judge of probate may, if the bond is insufficient, or if any convict is treated cruelly, or inhumanely, terminate the contract.—*Jeff. Co. v. Truss*, *supra*.—§ 4525, code 1896.

The judge properly overruled the motion to quash the petition.—§§ 4827, 4828, 4829, 4832, code, 1896; *Ex parte Jones*, 94 Ala. 33; *Ex parte Charleston*, 107, Ala. 488; *Crooms v. Shad*, 40 So. Rep. 497. The court erred in quashing the answer filed by appellant to the return of the corporation.—§ 4832; *Croom v. Shad*, *supra*; *Simmons v. Ga. C. & I. Co.*

The minutes of the board of revenue are the sole expositor of its action, and the court erred in admitting Perkin's testimony.—*Crenshaw Co. v. Sykes*, 113 Ala. 626.

MASSEY WILSON, Attorney General, and TILLMAN GRUBB, BRADLEY & MORROW, for State.—The act of hir-

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ing county convicts is purely administrative, and since Sec. 4594 has been repealed, what was said in the causes of *Ex parte White*, 81 Ala. 80, and *Ex parte Shortridge*, 115 Ala. 126, is not applicable.—*Haralson v. State*, 123 Ala. 89. The directions of the statute as to the times of the meeting of the board of revenue are directory merely, and whether held on that day or not, is immaterial.—*State Auditor v. Jackson Co.*, 65 Ala. 142; *Perry Co. v. Railroad Co.*, 65 Ala. 391. The county may waive the execution of a bond without in any way affecting the interest of the convicts.—*Ex parte White, supra*; *Ex parte Haralson, supra*. The contract can only be annulled by a certain person and upon certain contingencies, and the governor alone has authority to annul it.—26 A. & E. Ency. of Law, pp. 604-5, 640-645-671; *Jeff. Co. v. Truss*, 85 Ala. 486. The convict is not entitled to relief by reason of the certificate of the probate judge in respect to the insufficiency of the bond.—*Jeff. Co. v. Truss, supra*.

TYSON, J.—The appellant sued out a writ of habeas corpus before Hon. Samuel L. Weaver, associate judge of the criminal court of Jefferson county, complaining that he was unlawfully imprisoned or restrained of his liberty by the Sloss-Sheffield Steel & Iron Company, hereafter called the "Sloss Company." On the hearing he was remanded to the custody of the Sloss Company, from which order this appeal is prosecuted.

The case made is that appellant was convicted and sentenced in Mobile county to hard labor, and under a contract with the authorities was hired and delivered to the Sloss Company, and was in its custody under said contract working out his unexpired sentence when the writ was sued out. Pretermittting all consideration of the insistence that the contract was not made by the board of revenue and road commissioners because not fully and completely shown by the minutes of the board, and that the bond never went into effect because not actually approved by the judge of probate, we will consider only the construction of the statute (section 4525 of the code of

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1896) in respect to the annulment of the contract of hiring, as in our opinion it is decisive of the cause. After the delivery of the petitioner to the contractor, the judge of probate of Mobile county annulled the contract on two distinct grounds: One, that the bond "is insufficient"; the other, that the convicts had been treated inhumanly; and also by general order not specifying any cause. One of the orders, however, was made after the writ was sued out, but before the trial—one on May 14th, the day of the date of the writ; the third on the 30th of April. After such annulment the board of revenue and road commissioners of Mobile county hired the convicts, including petitioner, to a third party. The trial judge, on the objection of the state and of the Sloss Company, excluded all evidence of the annulment of the contract by the judge of probate. This ruling of the court is sought to be justified on several grounds: First, that the orders were in two instances made by the judge after the institution of this proceeding; second, that the annulment on the ground of the insufficiency of the bond does not show that it proceeded on the bond having become insufficient since it was given, but on the ground that it was then insufficient; and, third, that the judge was without authority to annul contracts as to convicts worked out of the county on the ground of ill treatment except on the order of the governor, and that no such requisition was here shown.

We shall consider the last point first. There can be no doubt of the general aversion of courts to summary proceedings, and especially where they are entirely *ex parte*. But necessity on principles of public policy may reasonably call for the application of such remedies, and, where they relate entirely to executory contracts, the dangers of application to property rights is minimized. When a continuous contract is entered into there can be no injustice in either or both parties reserving an unqualified right to put an end to the contract in the future at pleasure. So here, the welfare of the convicts subjected to penal servitude, of whom the state is guardian as it were, could well dictate the policy of reserving the right to

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terminate the contract for the employment of state criminals. Such matters, like many others, cannot await the tedious termination of ordinary adversary legal proceedings. The question then is: First, whether this right was reserved in this instance to be exercised by the judge of probate; and, second, whether it has been duly exercised?

As to convicts not sentenced to hard labor for the county, contracts for their hire may be terminated summarily and wholly ex parte, under section 4475 and section 4509 of the code of 1896, by the president of the board of inspectors, for cause, on the approval of the governor or by the governor "without assigning any reason therefor." As to convicts sentenced to hard labor for the county, the system is somewhat different from that applicable to convicts in the penitentiary. As to the latter the county authorities have no authority or responsibility, but as to the former there is a dual case.—*Jefferson County v. Truss*, 85 Ala. 486, 5 South. 86. Section 4523 of the code of 1896 prescribes that the inspectors of state convicts shall visit county convicts whenever they shall deem it necessary, and shall rigidly scrutinize and inquire into their treatment and management, and report to the judge of probate, in writing, as to their condition and treatment. Then follows the provision that the contract of hiring by the county authorities must contain a provision "that the contract shall end if the bond, in the opinion of the judge of probate, becomes insufficient, or if any convict is treated cruelly or inhumanely by the hirer or his employes." Then follows another provision that: "Whenever the board of inspectors shall notify the governor that convicts who have been sentenced to hard labor for the county should be removed from the place where they are at work, or from the control of the person who has them hired, it shall be his duty to order the judge of probate of the county where said convicts were convicted, to remove them from such place, or to annul such contract as the case may be," etc. It thus appears that as to county convicts the president of the board of inspectors has no power to annul contracts, and

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that the governor has the power only indirectly through the judge of probate. At the same time it appears that the board of inspectors must report the management to the probate judge.

The question in construing the section is whether the judge of probate must be moved to the annulment of the contract by the order of the governor, or may act voluntarily on the information furnished by reports made to him, or otherwise obtained, on which to form an opinion. Does the fact that the governor is given the right to compel the judge of probate to annul the contract of hiring, in a subsequent clause, put a construction on the previous clause so as to exclude the exercise of the power by the judge of probate without compulsion? Is there any incompatibility in such a power being in the governor and at the same time an authority in the judge of probate to act without extraneous compulsion? We can see none. The clause of the section providing that the contract of hiring must contain a stipulation "that the contract shall end if the bond, in the opinion of the judge of probate, becomes insufficient, or if any convict is treated cruelly or inhumanely by the hirer or his employes," may be read with perfect consistency with the rules of rhetorical and grammatical expression, by making the clause "in the opinion of the judge of probate" applicable to each of the clauses—one relating to the bond, and the other to inhumane treatment. In the composition of compound sentences stipulating, as here, that the subject ("contract") shall have a certain status ("end") on the happening of one of two or more conditions or events connected by "or," the subject and predicate are usually and naturally expressed in connection with the first alternative condition, and left to be supplied with the other. The first condition here is "if the bond becomes insufficient," not, however, absolutely so, but qualifiedly; that is, "in the opinion of the judge of probate." It can make no difference where this qualification, so far as the first condition is concerned, is placed, so it precedes "or." In its relation as expressed it determines, limits, and defines the first alternative, by

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pointing out how the fact which is to end the contract is to be determined. The first sentence can be read thus: "The contract shall end, if in the opinion of the judge of probate the bond becomes insufficient." The question then is whether in the next alternative introduced by the word "or" the qualifying clause used with reference to the first condition is not to be supplied as to the second, just as the subject ("contract") and the predicate ("shall end") are supplied. It is just as grammatical and proper to carry forward the mode of determining the fact which is to end the contract, as it is to supply the subject and predicate in the several alternatives connected by "or." And we think such is the meaning of the statute. Why are reports on the condition of the convicts to be made to the judge of probate if he can act only on compulsion by the governor moved by the notice given by the inspectors to him? The power to compel action, lodged in the governor, by the judge of probate was not intended to give the judge jurisdiction to act, but to prevent his neglect to act voluntarily. The power to force the judge of probate to act is a "cumulative precaution, designed to better insure the humane treatment of convicts. It may have been supposed that local officers would sometimes neglect this duty."—*Jefferson County v. Truss, supra*. This case expressly holds that section 4525 of the code of 1896 applies "to all convicts hired out by the court of county commissioners." Therefore no distinction can be drawn as to the power of the judge of probate in respect to convicts hired to work in or out of the county to terminate the contract of hiring. And we hold that under this section the judge had the right to annul the contract for either of the causes enumerated therein.

The point that the annulment for the insufficiency of the bond must be confined to the case of a change in the sufficiency from what it was when originally made is entirely too narrow. It is the present state of insecurity for the future that justifies the act, and not a change from the original sufficiency. The law supposing and taking it for granted that a sufficient bond has been orig-

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inally taken gives the judge of probate authority to judge of the sufficiency at any future time, and finding it then insufficient calls into existence the power of annulment. In habeas corpus proceedings the enquiry is as to the lawfulness of the detention. It is the status of the petitioner at the trial which determines his rights. As said by Mr. Church, in his most excellent work on Habeas Corpus: "On a habeas corpus, the decision should be made upon the actual status of the case at the time of the decision, and not according to the state of things when the writ was allowed." The detention may become lawful when originally unlawful, or unlawful when originally lawful; and in such cases the court is bound to regulate its judgment according to the status at the trial. It would be preposterous to remand a prisoner to be hanged who has been pardoned after the date of the writ. In short, it is the status at the time of the trial which the court views and therefore it must receive proofs to that point, though it may involve a change of the original status.

In this case, although the petition was sworn to on the 12th day of May, the writ was not issued until two days thereafter and was not heard until the 11th day of June. On the 30th day of April, the probate judge made an order annulling the contract with the Sloss Company because of inhuman treatment of the convicts. On the 14th of May he made a similar order without specifying the grounds on which it was based, and on the 21st day of May a similar order was made on the ground that the bond of the hirer "is insufficient." If the judge was authorized and empowered to make these orders, and we have shown that he was, they put an end to the contract with the Sloss Company, and the exercise of that authorization or power in the absence of fraud or collusion is final.—*Jefferson County v. Truss, supra*; *Lynde v. County*, 16 Wall. (U. S.) 6, 21 L. Ed. 272; *Plock v. Cobb*, 64 Ala. 127. After the making of these orders the Sloss Company ceased to be "the person authorized by law to detain" the appellant, and therefore he is entitled to relief, but not to his discharge. On the evidence offered, but which the trial judge refused to admit, he

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should have been discharged from the custody of the Sloss Company and remanded to the custody of the jailer of Jefferson county until hired out or disposed of by the board of revenue and road commissioners of Mobile county.—§§ 4838, 4839, code 1896; *White v. State*, 134 Ala. 197, 32 South. 320; *State v. Roberts*, 126 Ala. 87, 28 South. 744; 15 Am. & Eng. Ency. Law (2d Ed.) p. 209.

The order appealed from is reversed and the cause remanded for further proceeding in accordance with this opinion.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

The State v. Sikes.

Habeas Corpus.

(Decided July 6th, 1906. 41 So. Rep. 777.)

1. *Criminal Law; Bail; Appeal by State; Exceptions.*—It is not necessary to show on an appeal by the State from a judgment on habeas corpus admitting a prisoner to bail, under Section 4314, Code 1896, that an exception was reserved on the trial to the rendition of the judgment, especially when the judgment recites notice of appeal given by the State at the time of the rendition of the judgment.
2. *Same; Time.*—Where the bill of exceptions was signed within the time fixed by the court, and within the thirty days allowed by Section 4126, Code 1896, it was signed in time and the appeal taken in time.
3. *Same; Omitting Evidence; Review.*—This court will not, on appeal, review the judgment of the lower court on the facts, where the bill of exceptions does not purport to set out all the evidence.

APPEAL from Crenshaw Probate Court.
Heard before HON. F. M. TANKERSLEY.

[The State v. Sikes.]

Habeas corpus on petition of Walton Sikes. From an order granting bail, the state appeals.

The facts touching the appeal and the signing of the bill of exceptions are stated in the opinion of the court.

MASSEY WILSON, Attorney-General, and C. R. BRICKEN Solicitor for State.—No brief came to the reporter.

D. M. POWELL and F. B. BRICKEN, for appellee.—Neither the judgment entry or the bill of exceptions show an exception reserved to the ruling of the court in allowing bail, and the presumption is that none was taken. The bill of exceptions does not purport to set out all the evidence and the presumption is that there was evidence in the case authorizing the court to allow bail.—*Hudson v. Grocery Co.*, 105 Ala. 201. In cases of this character the finding of the trial court will not be disturbed unless the record shows it to be clearly and manifestly erroneous.—*Ex parte Richardson*, 96 Ala. 110; *Ex parte Sloan*, 95 Ala. 22; *Ex parte Nettles*, 58 Ala. 275; *Ex parte McAnally*, 53 Ala. 495; *Ex parte Allen*, 55 Ala. 258. The bill of exceptions was not signed in time.

DOWDELL, J.—The appeal in this case is prosecuted by the state from an order of the probate judge admitting the appellee on his petition for writ of habeas corpus to bail, while being held in custody under an indictment charging him with a capital offense. In such a case as the one before us, code 1896, § 4314, authorizes an appeal by State. In order to support the appeal under this section, it is not necessary to show that the state, at the time the judgment was rendered admitting the petitioner to bail, reserved an exception to the rendition of the judgment. Notice of the appeal was given by the state at the time of the judgment rendered admitting petitioner to bail, and the judgment so recites. The appeal, therefore, was taken within 30 days, as provided in section 4316 of the criminal code of 1896.

There is no merit in the question raised on the signing of the bill of exceptions. The bill of exceptions was

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signed within the 30 days fixed by the judge for the signing of the same, and this was within the time allowed by the statute (section 4316) for taking the appeal. The bill of exceptions does not purpose to set out all of the evidence introduced on the hearing. In this state of the record, we are unable to say that the judge of probate before whom the hearing was has erred in admitting the petitioner to bail. The rule is well settled that in appeals from judgments of trial courts, where the bill of exceptions fail to set out all of the evidence, the judgment on the facts will not be disturbed. We fail to see why this rule is not applicable to a case like the one before us. It results that the order of the probate judge admitting the petitioner to bail must be affirmed.

Affirmed.

WEAKLEY, C. J., and ANDERSON and DENSON, JJ., concur.

Wray v. The State.

Habeas Corpus.

(Decided July 6th, 1906. 41 So. Rep. 878.)

1. *Criminal Law; Preliminary Proceedings; Commitment.*—The judge of the criminal court, as a conservator of the peace, has authority to commit and hold offenders to answer an indictment, and, upon habeas corpus by defendant, it is immaterial whether the mittimus of the committing magistrate was valid or not.
2. *Habeas Corpus; Hearing; Conduct of Cause.*—The state has the right to open and conclude the argument on habeas corpus proceedings.

APPEAL from Jefferson Criminal Court.

Heard before HON. D. A. GREENE.

Habeas corpus by Richard H. Wray to obtain his discharge from imprisonment on bail. From an order denying bail, petitioner appeals.

[Wray v. The State.]

The allegations of the petition are that the defendant is entitled to bail and that he is restrained without authority of law, in that the justice who tried the case and issued the mittimus, one W. P. Russell, was a justice of peace in beat 11, Jefferson county, Ala., and that he tried the case in beat 22, in said county, and issued his mittimus therefrom. After the conclusion of the evidence the defendant claimed the right to open and conclude the argument. This right was denied by the court, and the state was permitted, over the objection of defendant, to open and conclude the argument. The bill of exceptions then recited: "After argument by the state and by petitioner, the judge ruled that the petitioner was not entitled to bail and committed the defendant on the mittimus without bail. To this action of the judge the petitioner excepted." The judgment of the court on the application is not otherwise shown by the transcript.

SHUGART & BELL, and B. M. ALLEN, for appellant.—The justice issuing the mittimus exceeded his jurisdiction by holding the trial in a beat other than that of his residence and election.—*Ex parte Goucher*, 103 Ala. 305. The only authority set up by the sheriff in his return is the mittimus, and under the facts in this case, it was no authority at all.—*Ex parte Davis*, 95 Ala. 9. On the facts in this case as developed by the testimony of all the witnesses, the defendant was not guilty of murder in the first degree, and hence, he was entitled to bail.—*Ex parte Simonton*, 9 Port. 390; *Ex parte McCrary*, 22 Ala. 65; *Ex parte Bryant*, 34 Ala. 370; *Brown v. State*, 109 Ala. 79. The defendant is not shown to be guilty by that full measure of proof that the law requires.—*Acree v. State*, 63 Ala 234; *Bryant v. State*, 116 Ala. 445.

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

ANDERSON, J.—Pretermittin any question as to the regularity or validity of the mittimus issued by the

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Magistrate, Russell, the judge of the criminal court is a conservator of the peace, authorized to hold offenders to answer indictments. He could hear evidence as upon a trial de novo, and upon sufficient proof command the imprisonment of the petitioner independent of the validity of the original commitment.—*Pruitt v. State*, 130 Ala. 147, 30 South. 451, and cases cited.

We hold that the state has the right to open and conclude the argument in habeas corpus proceedings. The judge of the city court had the witnesses before him, and after a careful consideration of the evidence we are not prepared to say that he erred in denying the defendant bail, and the judgment must be affirmed.

Affirmed.

TYSON, SMPSON, and DENSON, JJ., concur.

The State v. Fuller.

Habeas Corpus.

(Decided June 30th, 1906. 41 So. Rep. 990.)

1. *Habeas Corpus; Jurisdiction.*—The chancellor of the Northeastern Chancery Division, embracing the county of Elmore, has jurisdiction to try, and a petition for habeas corpus for one in prison in the penitentiary in Elmore County, is properly addressed to such chancellor, under Section 4317 of the Code of 1896.
2. *Same; Return of Writ; Where Returnable.*—Where a habeas corpus writ was granted by the Chancellor of the Northeastern Chancery Division, embracing the County of Elmore, and the writ was granted more than ten days before the time fixed by law for the holding of the circuit court in said County, the writ was properly made returnable before the Chancellor, and he had power to make it returnable to him at Anniston in another County.
3. *Same Appeal; Certification of Transcript.*—Where writ of habeas corpus was returnable before the Chancellor of the Northeastern Chancery Division, at Anniston, the cause was pending in the Chancery Court of Calhoun County, if pend-

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ing anywhere, and a record certified on appeal by the Register in Chancery of that Court, and by the Chancellor, is sufficiently certified.

4. *Courts; County Court; Establishment; Validity of Statute.*—The fact that the act creating the County Court of Cleburne County (Acts 1896-7, p. 802) confers on said court the same jurisdiction and powers of the circuit court, does not render the same unconstitutional.
5. *Habeas Corpus; Questions Determinable.*—The defendant cannot complain that Section 31, Acts 1896-7, was violative of the constitutional provision and that the prosecution against him was not properly before the County Court, although no order was made by the Circuit Court transferring the cause to the County Court, but the cause was placed on the docket of the County Court, where the defendant and the solicitor agreed upon an attorney as special judge to try the cause in the County Court, and defendant pleaded to the indictment and was convicted and appealed to the Supreme Court where the judgment was affirmed.

APPEAL from Calhoun Chancery Court.

Heard before HON. W. W. WHITESIDE.

Habeas corpus by Levi J. Fuller to obtain his release from the penitentiary. From an order discharging petitioner from custody, the state appeals.

Agreed statement of facts:

"That on, to-wit, March 7th, 1896, Levi J. Fuller was indicted for murder in the first degree in the circuit court of Cleburne county, Alabama, a copy of the indictment against him being attached to the petition marked exhibit "A," and being a true copy; that the said Fuller was twice convicted and each time on appeal by him was reversed by the supreme court of Alabama and remanded back by the supreme court of Alabama to the circuit court of Cleburne county for a new trial; that the offense with which said Fuller was charged was a felony and he was unable to give bail. That after and since the second reversal of said cause by the supreme court of Alabama, the same has never appeared on the circuit court docket of said county, but was transferred to the docket of the county court of said county, which was cre-

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ated after the finding of the indictment against petitioner ;that there is of record no order or certificate in regard to the transfer of said cause from the circuit court of Cleburne county to the county court of Cleburne county. That said cause was omitted or left off of the docket of the circuit court after the passage of the act of 1896-7, pages 814-815 and after that time was docketed on the docket of the county court; that the clerk of the circuit court and the clerk of the county court at that time were one and the same person; that petitioner, Levi J. Fuller, had no knowledge nor had his attorneys any knowledge of the act of the clerk in transferring the said cause from the circuit court into the county court until the said cause appeared on the docket of the county court for trial. That on January the 18th, 1898, said Levi J. Fuller was tried and convicted in the county court of Cleburne county and was sentenced to the penitentiary for a period of thirty years, being tried and convicted under the indictment found against him by the circuit court of Cleburne county, the judgment entry and sentence of the court being as set forth in the exhibit to the original petition marked exhibit "B;" that since the time of his conviction and sentence and under and by virtue of such conviction and sentence, the said Levi J. Fuller has been and is now imprisoned at the state penitentiary at Spigners, Alabama, in Elmore county, in said State, by S. D. Fields as warden of said penitentiary. That the said county court of Cleburne county and the circuit court of Cleburne county, Alabama, at the time of such conviction and sentence had concurrent jurisdiction of offenses committed in Cleburne county, and of offenses similar to the one charged in the indictment against this defendant ;that said Levi J. Fuller was represented by attorneys in the trials before the circuit court of Cleburne county and the same attorneys in the trial before the county court of said Cleburne county and was present in person during each of said trials; that no objection was made by him or his attorneys to being tried by the county court of Cleburne county; but upon the case being called for trial he went to trial in the county court of Cleburne county upon his plea of not guilty and the

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question of the jurisdiction of said county court of Cleburne county was never raised by him and has never been raised until the filing of this petition. That after his conviction by the county court of Cleburne county and after his sentence by said court he prayed and took an appeal from said sentence to the supreme court of Alabama, and that in said court no objection was made by him or his attorneys to the jurisdiction of the county court of Cleburne county, and that said cause was affirmed by the supreme court of Alabama."

MASSEY WILSON, Attorney General, for State.—From the agreed statement of facts it appears that the petitioner was convicted in the county court of Cleburne county of murder in the second degree, and on an appeal, the case was affirmed in this court.—*Fuller v. State*, 117 Ala. 36. The judgment of affirmance in this court merged the judgment of the county court, and that judgment was no longer of force.—*Thompson v. Gray*, 84 Ala. 559; *Werborn v. Pinney*, 76 Ala. 291; *McArthur v. Dane*, 61 Ala. 539; *Roach v. Privett*, 90 Ala. 391, 24 Am. St. Rep. 819; *Tillis v. Prestwood*, 107 Ala. 618; *Ex parte State*, 94 Ala. 431; *Ex parte Henderson*, 84 Ala. 36; *Duncan v. Hargrove*, 22 Ala. 150; *Hassell v. Hamilton*, 33 Ala. 280; *Wilson v. Isbell*, 45 Ala. 142.

Conceding that the legislature cannot deprive the circuit court of jurisdiction to try indictments, and that the act in question is unconstitutional to that extent, it by no means follows that the judgment rendered against the defendant in the county court was void.—17 A. & E. Ency. of Law, 1054; *Harrison v. Harrison*, 20 Ala. 629; *Stanley v. Bank*, 23 Ala. 652; *Lampley v. Beavers*, 25 Ala. 534; *Gager v. Doe*, 29 Ala. 341; *Aderhold v. Anderson*, 99 Ala. 521; *Ex parte Rice*, 102 Ala. 671. Assuming all the propositions above asserted to be without merit, the defendant is still not entitled to an absolute discharge. The state has endeavored to give him a trial, and because of mistaken legislation or supposed valid legislation, the defendant has not had a trial, for this reason, there has been no discontinuance.—*State v. McFarland*, 121 Ala. 45.

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H. D. McCARTY and H. D. MERRILL, for appellee.—The appeal in this case should be dismissed; first, because the transcript and certificate of appeal in said cause were made by a person not authorized by law to make the same. Second, the transcript and certificate were not made by the clerk of the court in which the record of the judgment appealed from should properly be. Third, said transcript and certificate were made by the register in chancery for Calhoun county, whereas, the judgment from which the appeal was taken was pending before the chancellor of the north-eastern chancery division, and said cause was properly pending in the chancery court of Elmore county; and the transcript and certificate of appeal should have been made by the register of the chancery court of Elmore county.—§ 4817, code 1896; § 4818; 31 A. & E. Ency. of Law, p. 240; *Kirby v. State*, 62 Ala. 51; 2nd Mayfield, pp. 689-690; 3rd Mayfield, p. 1193. The act conferring exclusive jurisdiction upon the county court of Cleburne county is unconstitutional.—Acts 1896-7, p. 814; *Adcock v. State*, 37 So. Rep. 919. This being true, on the defendant having been tried and sentenced by the county court of Cleburne county, defendant is entitled to an absolute discharge: first, because there has been a discontinuance of his cause upon the dockets of the Cleburne court.—*Ex parte Rives*, 40 Ala. 714; *Ex parte Holton*, 69 Ala. 168; *Ex parte Stern*, 104 Ala. 96. He is entitled to an absolute discharge for the further reason that he has been denied a speedy public trial.—*Ex parte, the State*, 76 Ala. 484; *Sampler v. State*, 138 Ala. 259. For cases analogous in principle we refer to the following: *State v. Stallmaker*, 2 Brev. 44; *In re McMicken*, 39 Kan. 409; *Nixon v. State*, 41 Amer-Dec. 601; *Ex parte Stanley*, 4 Nev. 113.

DENSON, J.—Section 4817 of the code of 1896 provides that a petition for habeas corpus when the person making it is confined in the penitentiary, must be addressed to the judge of the city court, or to the nearest circuit judge or chancellor. The petition in this case shows that the petitioner was confined in the peniten-

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tiary at Spigners in Elmore county. We have no trouble in reaching the conclusion that the petition was properly addressed to the chancellor of the north eastern chancery division which embraces the county of Elmore. And, as the writ was granted more than 10 days before the time fixed by law for the holding of the next term of the circuit court to be held for Elmore county, it was properly made returnable before the chancellor of that chancery division, and he had the power to make it returnable before him at Anniston.—Code 1896, § 4819.

There is no merit in the motion to dismiss the appeal. The writ was made returnable before the chancellor at Anniston; if it can be said of the cause that it was pending in any court, it was the chancery court of Calhoun county, and the register in chancery of that county was pro hac vice, the clerk for the purpose of making, certifying, and transmitting the transcript of the record. The record is here certified by the register and also by the chancellor.—Code 1896, § 4314. The case presented by the record is rather a novel one and one not entirely free from difficulty. The defendant was indicted at the spring term, 1896, of the circuit court held for Cleburne county, for the crime of murder. He was twice convicted in that court, but the judgment of conviction was reversed each time and the cause remanded. After the second reversal the cause was transferred to the county court of Cleburne county and was there tried in January, 1898; the defendant was convicted the third time and sentenced to imprisonment in the penitentiary for thirty years. On appeal the judgment of the county court was affirmed by this court.—*Fuller's Case*, 117 Ala. 36, 23 South. 688.

The county court of Cleburne was created by an act of the general assembly approved February 16, 1897.—Acts 1896-97, p. 802. The first section of the act confers on the court the same jurisdiction and powers of the circuit court. It is provided in the thirty-first section (page 814), of the act that at any time after the spring term, 1897, of the circuit court of Cleburne county, when any person is confined in the jail of said county on a charge of felony in the circuit court, and is not entitled to bail,

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or is unable to give bail, said cause shall be transferred to the said county court, and the clerk of the circuit court shall transfer said cause and the same shall be tried in the county court as if the indictment therein had been returned into the county court in the first instance.

The petitioner was confined in the jail of Cleburne county and was unable to give bail. The cause against him was docketed by the clerk of the circuit court, who was ex-officio clerk of the county court, on the county court docket after the spring term, 1897, of the circuit court had been held, and not within 30 days before the succeeding term of the circuit court. Under the statute the duty of the clerk to so docket the case is made mandatory. The case was tried in the county court without any question being raised by the petitioner (defendant there) as to the jurisdiction of the county court to hear and determine the cause.

It is now insisted by the petitioner (appellee) that the part of the thirty-first section of the county court act heretofore referred to, is in conflict with section 5, of article 6, of the constitution of 1875 (section 143 Const. 1901), and, therefore, that its enactment was not within legislative competency. The case of *Adcock v. State*, 142 Ala. 30, 37 South. 919, is relied upon as supporting the contention. The act construed in the case of *Adcock*, is one entitled: "An act to further regulate the practice and procedure of the circuit court of Clay county, Alabama," and was approved December 13, 1898.—Acts 1898-99, p. 196. The first section provides: "That from and after the 1st day of March, 1899, no grand jury shall be drawn, impaneled and summoned for the circuit court of Clay county, except upon the order of the circuit judge of said court, such order must be forwarded to the clerk thereof, and filed by him at least twenty days before the first day of the term of said court, for which said grand jury shall be called. All indictments returned by such grand jury shall be immediately transferred by the clerk of said court to the county court of Clay county, for trial, and it shall take no order of the court to carry this provision into effect." A grand jury was organized

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in the circuit court without the judge first making the order provided for by the act, and the indictment against Adcock was returned by such grand jury. Adcock moved that the cause be transferred to the county court, and pleaded in abatement of the indictment, and upon the ground that the grand jury was illegally organized. The circuit court overruled the motion and plea and tried the defendant. This court on appeal from the judgment of conviction, held that the provisions of the act of December 13, 1898, "whereby it was intended to deprive the circuit court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of the court prior to the convention of the court, were violative of section 5, article 6, of the constitution of 1875 (constitution of 1901, § 143)." In the *Adcock Case* the transfer had not been made, and the state resisted the transfer and insisted on the trial going on in the circuit court. And it might be conceded that, if the defendant in the case at bar had raised the question in the county court and had there insisted that his case should remain in the circuit court, the county court would have been without authority to try the cause. It is not necessary, however, to determine that question here; nor is it necessary to determine whether the act in question infringes on the constitutional jurisdiction or right of the circuit court to try the cause if the question had been raised by the state as was done in the *Adcock Case*.—*Ex parte Hickey*, 52 Ala. 228. It was entirely within the legislative competency to create the county court and give it jurisdiction concurrent with the circuit court, and we do not doubt that it was also within legislative competency to provide, with the consent of parties, for the removal of causes pending in the circuit court to the county court, and vice versa.—*Hickey's Case*, *supra*; *Adcock's Case*, *supra*; *Ex parte Rice*, 102 Ala. 671, 15 South. 450. The county and circuit courts are of concurrent, coequal jurisdiction of the crimes of the kind charged in the indictment against the petitioner, and sit within the same territorial jurisdiction. The

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record here, it is true, shows that there was no order of transfer made in the circuit court, and it must be conceded that the cause was placed on the docket of the county court by the clerk in pursuance of the terms of the act creating the county court. But the record affirmatively shows that when the cause was called for trial in the county court, it appeared that the presiding judge was incompetent on account of having been of counsel in the prosecution, and the prosecuting attorney and the defendant in person and by counsel in open court, agreed upon an attorney to act as special judge in the trial of the cause; that the defendant was arraigned in open court and pleaded a former acquittal of murder in the first degree, which plea was sustained by the record of the former trial of the circuit court, and was thereupon confessed by the solicitor; that the defendant was then put on trial on the indictment for murder in the second degree and pleaded not guilty. He was convicted, appealed to this court, and the judgment of the county court was affirmed. No question of the jurisdiction was raised until this petition was filed.

We have seen that the county court is a court having jurisdiction of the crime—the subject-matter—and by the course of conduct on the part of the defendant, and of the representative of the state, “the existence of all facts essential to the jurisdiction of the county court was affirmed, and upon the affirmation, the court could not but act judicially.”—*Ex parte Rice*, 102 Ala. 671, 15 South. 450; *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 322, 22 L. Ed. 823. As was said by Brickell, C. J., speaking for the court in *Ex parte Rice*, *supra*: “Consent cannot confer jurisdiction, it is true, but it is jurisdiction of the subject-matter which is derived from the law, which parties may not by consent confer. When jurisdiction of the subject-matter is conferred by law, jurisdiction of the person may be acquired by the acts of consent of parties.” On the authority of that case we hold, that by the course of conduct which the record shows the petitioner pursued in the county court, that court acquired jurisdiction of his person and

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he cannot now be heard to urge its lack of jurisdiction, or that the cause was not properly in that court.

We are at the conclusion that the chancellor should have denied the prayer of the petition, and a judgment will be here rendered setting aside the order made by the chancellor, and dismissing the petition.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

Ladd v. Lookout Mountain Distilling Co.

Bill to Enjoin Foreclosure; and Cross Bill to Foreclose Mortgage.

(Decided April 10, 1906. 40 So. Rep. 610.)

1. *Evidence; Parol Evidence; Varying Terms of Mortgage; Admissibility.*—Parol evidence is admissible to show the consideration and the real nature of the transaction, although the mortgage recites a certain consideration different somewhat from that shown by the parol evidence.
2. *Mortgages; Foreclosure; Evidence; Sufficiency.*—The evidence in this case stated and examined, and held sufficient to support a finding that the mortgage had not been fully paid, authorizing foreclosure.
3. *Evidence; Verbal Admissions; Weight.*—The rule that evidence of verbal admissions is to be received with caution is emphasized when the witnesses disagree as to the admission among themselves, in their testimony on direct and cross, and after the lapse of some two years.

APPEAL from Jackson Chancery Court.

Heard before HON. W. H. SIMPSON.

The bill was filed by V. D. Ladd to enjoin the foreclosure of a mortgage executed to one Shamotulski, and by him transferred to the Lookout Mountain Distilling Company. The allegations are that the mortgage is ful-

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ly paid; and if not paid, a reference is asked to ascertain the amount due. The respondents filed a cross bill denying payment and asking that the mortgage be foreclosed by a decree and order of the chancery court. The facts are sufficiently stated in the opinion of the court. From a decree dismissing the original bill and a decree and order foreclosing under the cross bill this appeal is prosecuted.

J. E. BROWN, for appellant.—Counsel discussed the assignments of error but cite no authority.

VIRGIL BOULDIN, for appellee.—Counsel discussed the assignments of error but cite no authority.

WEAKLEY, C. J.—The bill was filed by V. D. Ladd to enjoin the foreclosure of a mortgage executed by him to John Shamotulski, and to have that instrument canceled, upon the allegation that it had been fully paid. The chancellor, finding upon the facts that there was a balance due upon the mortgage, dismissed the original bill, and decreed a foreclosure under the cross-bill, and ordered a reference to the register to ascertain the amount of the indebtedness for which he held the mortgage to be security. Although the mortgage, dated March 15, 1900, recites that it was given in consideration of the mortgagor's indebtedness to the mortgagee for \$1,000, evidenced by a promissory note of even date with the instrument, due on the 25th day of June, 1900, with provision that if payment of the note be made on or before the 25th day of December, 1900, the mortgage was to be void, yet the cross-bill sets up, and the chancellor found, that in truth the mortgage was intended and was accepted to indemnify Shamotulski to the amount of \$1,000 against loss by reason of his indorsing the notes of Ladd theretofore executed and thereafter to be executed from time to time to the Lookout Distilling Company for goods purchased under a line of credit allowed the mortgagor with said distilling company, and to secure the mortgagee against loss by reason of his having

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become responsible for all purchases made and to be made by Ladd from said company.

Mortgages are often taken as security for present and future advances, not accurately expressing the real consideration, but expressing, as in the present case, a note or other evidence of a present indebtedness. The validity of such mortgages is well established by our decisions, and it is firmly settled that parol evidence is relevant to show the real nature of the transaction.—*Hendon v. Morris*, 110 Ala. 106, 114, 20 South. 27, and authorities cited. Where it is sought to bring a case within the foregoing rule, undoubtedly it should be carefully and rigorously examined; “but if, upon such investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation.”—*Shirras v. Craig*, 7 Cranch (U. S.) 34, 3 L. Ed. 260; *Hendon v. Morris*, 110 Ala. 106, 114, 20 South. 27. We have given the pleadings and the testimony that rigorous examination which the case requires, and are thereby brought to the same conclusion which the learned chancellor reached. Without going too much into detail, we will state some of the considerations upon which our opinion rests:

It is admitted on both sides that the execution of the mortgage was the result of the application by Ladd to the distilling company for a sale to him on credit of a supply of liquors with which he desired to embark in the retail business. He offered to execute a mortgage on his real and personal property direct to that company, and upon the theory that the mortgage was simply to secure it for the goods first purchased, with no participation by Shamotulski personally in the transaction, such mortgage to the company would have been the natural and usual method of accomplishing the purpose of the parties. But the first purchase was of goods amounting to \$882.50, made on February 16, 1900, on which day Ladd executed to the distilling company four notes of

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\$215 each, payable at 30, 60, 90, and 120 days, and, if the purpose had been merely to secure these notes, why did the mortgagor, when preparing the mortgage himself, a month later, execute it to Shamotulski for \$1,000, fixing the law day on December 25, 1900? In view of the fact, the statement of Ladd that he never had any business transactions with the mortgagee on his own account is not satisfactory. The testimony of the mortgagee and of Cannon fully sustains the allegations of the cross-bill and the decree of the chancellor, and they find further support in the fact that, prior to the beginning of foreclosure proceedings under the power of sale, Ladd had not demanded either possession of the mortgage, or its satisfaction of record, or delivery of his note or notes. Moreover, when, in July, 1902, the attorney of the mortgagee requested a renewal or payment of the indebtedness under threat of foreclosure if his demand were not complied with, the mortgagor, Ladd, replied by letter, asking further indulgence, promising early payment, and making no claim that the mortgage had been fully paid.

We have not overlooked the testimony of two witnesses for the original complainant who speak of a statement or admission upon the occasion by the mortgagee as to the payment of all the mortgagor owed up to that time, and as to his satisfying the mortgage. The witnesses do not agree as to the merits of the admission, and the answer of one of them in chief does not correspond in substance with his answer on cross-examination. This evidence does not alter our opinion. It but serves to furnish striking proof of the accuracy of Mr. Greenleaf's observation that evidence of verbal admissions is to be received with great caution.—1 Greenleaf on Ev. § 200. This is especially true when the witnesses had no occasion to treasure up the words employed, and they testify long after the event.

No other argument is urged in support of the appeal beyond the one already disposed of, and, in consequence, the decree of the chancery court must be affirmed.

Affirmed.

TYSON, SAMPSON, and ANDERSON, JJ., concur.

[Ebersole v. Southern Building and Loan Association.]

Ebersole v. Southern Building and Loan Association.

Bill to Enjoin Foreclosure; for Cancellation of Mortgage, and For an Accounting.

(Decided April 28, 1906. 41 So. Rep. 151.)

1. *Principal and Agent; Powers of Agent; Burden of Proof.*—Where a stockholder, in a building and loan association, claims that the soliciting agent of the association had guaranteed the maturity of his stock in 72 months, the burden was on the complainant to show the agency of the one making the guarantee, and that it was within the scope of his authority.
2. *Building and Loan Associations; Maturity of Shares.*—The estimate made by a building and loan association as to when the stock will mature is not a guarantee, but the expression of an opinion.
3. *Depositions.*—A commissioner is not required to take down the answer of witness in his own handwriting. It is enough if he comply with Section 1841, Code 1896, and have it done by an impartial person or by the witness himself.

APPEAL from Jefferson Chancery Court.

Heard before HON. J. C. CARMICHAEL.

Bill by C. D. Ebersole v. So. B. & L. Asso., the purposes of which and the facts concerning which are sufficiently stated in the opinion of the court. The chancellor rendered a decree dismissing the bill from which this appeal is taken.

A. LATADY, for appellant.—No man can be held to have waived his rights unless such waiver is distinctly made with full knowledge of the rights he intends to waive; and the fact that he knows his rights and intends to waive them must clearly appear.—*Wilson v. Carpenter*, 91 Va. 192; *Montague v. Massey*, 76 Va. 314; *Hotchkiss v. Middlekauf*, 96 Va. 649. The appellant received, exclusive of interest, from appellee the sum of \$1,384.00, and appellee has received from appellant the sum of \$1,626.32. And the parties stand in the same relative

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positions and in equity and good conscience the appellee is indebted to appellant for the money which it has received, and used for corporate purposes.—*B. & L. Asso. v. Williamson*, 189 U. S. 122; *Allen v. LaFayette*, 89 Ala. 46.

CABANISS & WEAKLEY, for appellee.—Under the statute regulating the B. & L. Asso., all stock must be matured as soon as the payments made thereon, together with the profits earned, amount to the par value of the stock. It could not be sooner matured without doing wrong to the other members of the mutual organization.—*Providence v. Interstate Ass'n*, (Tenn.) 58 S. W. Rep. 265; *Miller v. Eastern, &c. Ass'n*, (Tenn.) 53 S. W. Rep. 231; *O'Malley v. Ass'n*, 36 New York Supp. 1016; *Daily v. Peoples, &c. Ass'n*, (Mass.) 52 N. E. Rep. 1090; *Baltimore, &c. Ass'n v. Poughattan Co.*, (Md.) 39 Atl. 274; *Heslin v. Eastern, &c. Ass'n*, 70 N. Y. Supp. 612; *Cantwell v. Welch*, (Ill.) 58 N. E. Rep. 414; *Peoples, etc., Ass'n v. Morris*, (Ark.) 56 S. W. Rep. 266; *Sumrall v. Commercial, etc., Ass'n*, (Ky.) 44 L. R. A. 659; *Latimer v. Equitable Co.*, 81 Feb. Rep. 776; *Bortche v. Equitable Co.*, (Mo.) 48 S. W. Rep. 954.

The estimate of the time when stock will mature is not a guaranty, biding on the association.—*Johnson v. Southern B. & L. Asso.*, 121 Ala. 278; *Motes v. Peoples etc., Asso.*, 137 Ala. 367. By giving the mortgage with the agreements therein contained the appellant changed the contract and waived the right to have his stock mature at a certain time.—*Pioneer S. & L. Co.*, 127 Ala. 521.

HARALSON, J.—The certificates of stock of the complainant in the defendant Association, recited that the shares of stock were subscribed for, "subject to all the conditions, rules, regulations and by-laws of said Association now in force or which may be hereafter enacted."

In his application for shares of stock, which formed part of his contract with the association, complainant agreed "to abide by all the terms, conditions and by-laws" of the company.

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Section 1, Art. 2 of the by-laws provides, "The certificates, terms and conditions of shares of the association, the by-laws and the application for membership, form the contract," with the company.

The bill as originally filed,—and this is the controlling point in litigation,—alleged that the complainant, in July, 1889, subscribed for and had issued to him twenty (20) shares of the stock of the defendant association of the par value of \$1,000.00, and at the time said subscription was made, the association guaranteed to him that the stock would mature after seventy-two (72) monthly payments thereon; that afterwards, on the 5th day of October, complainant subscribed for twenty (20) additional shares, on the faith of a similar guaranty, as to the maturity thereof; that complainant had borrowed of the association various sums of money, aggregating more than fifteen hundred (\$1,500.00) dollars, to secure which, all of said shares of said stock had been pledged to the association, and a mortgage had been executed by him, also, on certain real estate, to secure one of the loans of \$1,000.00; that complainant had made seventy-two monthly payments on all of said shares, but that the association had failed to mature the same, and was taking steps to foreclose said mortgage. The bill prayed for an injunction against said association; that the mortgage might be canceled, and also asked for an accounting.

The answer denied that said association made any promise or agreement with complainant that said stock would mature in seventy-two months, as alleged in the second and third paragraphs of the bill, and denied specifically, that the association ever, at any time, made any promise or agreement with complainant, that any of the shares of stock would mature at any definite time, or on the payment of any definite number of monthly installments on said stock. On final hearing on pleadings and proof, the chancellor dissolved the injunction theretofore granted, and dismissed the bill.

The complainant testified, that he was solicited to take the stock by one Mr. Hammon, who guaranteed

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that the stock would mature in seventy-two months; and W. A. Simmons testified, in substance, to the same thing; but on his cross-examination he testified substantially that the literature of the company which Hammon handled, contained the guaranty; but it is not anywhere satisfactorily shown, that Hammon stated to the complainant, that the association would guarantee the stock to mature in the time stated, nor that it was so represented in the association's literature. It does not even clearly appear that Hammon was an agent for the company and there is an entire lack of evidence to show that he had any authority to make a guaranty for the company. From aught appearing, he may have been engaged, merely, in soliciting stock under some agent of the association; and whatever Hammon may have said to, or agreed with complainant in respect to the maturity of the stock, was not binding on the association. It was done so far as appears, without the authority or approval of the association. The burden was on the complainant to show the agency and that the guarantee was within the scope of the agent's authority, neither of which was established. Across one of the applications for stock was printed in red ink, "Agents have no authority to inspect property, or, to promise a loan, at any given time, or make any promise not in conformity with our printed matter."

The witness, S. R. Cruse, examined by defendant, who was the secretary of the association, was asked by complainant on the cross, if it was not a fact that the association undertook that all its shares both to investors and borrowers, alike, should mature on the basis of seventy-two monthly payments, and he replied, "I do not know of any literature originally issued by the association setting forth such an undertaking on the part of the association. The literature of the association has always been upon the basis of an estimate; that is, an estimate simply of the amounts that would probably be realized in about six years. * * * The original by-laws do not provide for maturity after making seventy-two payments. Section 18 of the by-laws fully sets forth

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about the maturity of the shares, but no mention is made as to the number of payments being 72." Attached to the deposition appears what purports to be a bulletin, as a part of the literature of the association setting forth its objects, plans, etc., in which appears, as a part of its plan, the following: "The Southern Building & Loan Association issues shares (limited by the laws of the State of Alabama) of \$50.00 each. Any person may become a shareholder and apply for a number of shares. Whenever the amount in the loan fund to the credit of the share (from maturity payments and profits) equals \$50.00, such shares shall be fully paid in and be considered to have fully matured, and no more monthly payments shall be required. All shares are estimated to mature in about six years from their date, and the member may withdraw such shares and receive \$50.00 therefor." In all that appears in evidence, it would seem to be fully established, with nothing to the contrary,—except the vague and uncertain evidence of complainant and Simmons as to what Hammon stated to them, and their uncertain recollection of what the literature of the company contained,—that no definite time was ever stated to those witness or published to the world in the literature of the association, as to when the shares would certainly mature. It does appear, that it was estimated that the shares would mature in about six years or seventy-two months. But there was no guaranty to this effect. Furthermore, it appears from the evidence, that complainant discontinued the payments of maturity installments on his shares before the amount in the loan fund to the credit of his shares, from maturity payments and forfeits, equaled \$50.00 for each share, and that the payments were discontinued prior to the time when maturity could be declared. At the time he ceased to pay on the shares, or discontinued payments of dues, the value of his certificates, number 429, was \$658.28, and of the other, number 4,590, was \$612.36.

It is true that the association, for several years after it commenced business, estimated that its stock would mature after seventy-two monthly payments. Every as-

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sociation doing a similar business, must, necessarily make such an estimate, that its stockholders and borrowers may form some idea when the stock will mature; but such an estimate cannot be held, and was never held, so far as we know, to be a guaranty of the time of the maturity of the stock. Such representations were no more than the expression of opinion on matter equally open to observation and inquiry by both parties, and can not be treated as false representations. We have had occasion heretofore, to treat of this subject very fully, and will not now do so again.—*Beyer v. National Building & Loan Association*, 131 Ala. 376, 31 South. 113; *Motes v. People's Building & Loan Association*, 137 Ala. 374, 34 South. 344; *Johnson v. Southern Building & Loan Association*, 121 Ala. 524, 26 South. 201.

The motion to suppress the deposition of Cruse, on the grounds stated therefor, was properly overruled. There is no rule or statute that requires the commissioner, himself, to take down the answers of a witness in his own handwriting. "It is the duty of the commissioner to reduce the answers of the witness to writing, or cause it to be done by the witness himself, or some impartial person, as near as may be, in the language of the witness," etc. Code 1896, § 1841.

There are other questions raised and discussed, but they are unimportant, as what we have said disposes of the case.

Affirmed.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

[Gilbreath, *et al.* v. Farrow.]

Gilbreath, *et al.* v. Farrow.

Bill to Foreclose Mortgage and Cross Bill to Declare a Trust in the Mortgage Property.

(Decided July 6th, 1906. 41 So. Rep. 1000.)

1. *Trusts; Resulting Trusts; Bill to Establish.*—In order to establish a resulting trust in land, it must be alleged with distinctness and precision the facts out of which the trust originated, and the averments must be shown by clear, full and convincing proof.
2. *Appeal; Decisions Reviewable; Orders Entered After Final Decree.*—The appeal being taken from the final decree rendered in the cause, this court cannot, on such appeal, review an order denying a petition offered by the defeated party at a term subsequent to the one at which the final decree was rendered.

APPEAL from Marshali Chancery Court.

Heard before Hon. W. H. Simpson.

This was a bill filed by Thomas L. Farrow against Sam Gilbreath, Sallie Gilbreath, wife of Sam Gilbreath, and G. H. Pounds, seeking to foreclose certain mortgages executed by Gilbreath and wife to complainant and others and by such others transferred to complainant. Pounds answered admitting the allegations of the bill. Sallie Gilbreath filed an answer and cross-bill setting up that she is a married woman, the wife of Sam Gilbreath, and that she was such at the time each of the notes and mortgage set out and described was given for debts of Sam Gilbreath and husband of complainant in the cross-bill, and the complainant here merely signed said notes and mortgages as the surety of her husband, Sam Gilbreath. That Sallie Gilbreath owns in her own right an undivided one-half interest in and to a part of the lands described in the original bill, a description of which is set out in the cross-bill, and that she is in the peaceable quiet possession of the entire interest in said lands claiming them as her own and said lands constitute her homestead. That Sam Gilbreath the husband of complainant

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in the cross-bill holds a deed to one-half interest as is shown by a copy of the deed made an exhibit to the cross-bill, but that he holds the same as a bare trustee for Sallie Gilbreath, his wife; that she paid the entire purchase money for the same and has been in peaceable possession of the land since the making of the deed, and that both she and Sam Gilbreath have treated the lands as hers. Demurrers were interposed and sustained to the cross-bill.

STREET & ISBELL, for appellant.—The land included in the mortgage belonged to the wife, and the debts were those of the husband, and unless there is an estoppel against her, the mortgages were void as to her property.—Sec. 2529, code 1896, and citations. In order to raise an estoppel against her, three things must obtain. First, that the mortgagee was ignorant of her title.—11 A. & E. Ency. of Law, p. 432; *Cunningham v. Milner*, 56 Ala. 522; *Mills v. Graves*, 87 Am. Dec. 314; *Porter v. Wheeler*, 105 Ala. 451; 16 Cyc., pp. 759-765. Second, that she knew that he was ignorant of the fact, and third, that she remained silent knowing that her husband was about to obtain and the mortgagee about to extend credit upon the faith that the land was that of her husband.

The mortgage was usurious undisputedly, and the mortgagees were not bona fide purchasers.—*McCall v. Rogers*, 77 Ala. 349; *LeGrand v. Bank*, 81 Ala. 123; *Woolsey v. Jones*, 84 Ala. 88.

JOHN A. Lusk, for appellee. The only error complained of is the failure to grant the wife relief on her cross bill which she asked by reason of the use by her husband of funds belonging to her in the purchase of lands embraced by the mortgage.—*Mobile Life Insurance Company v. Randall*, 71 Ala. 220. If the beneficiary sleeps over her rights the court will not wrong him who is without fault.—67 Ala. 599. Every fact necessary to enable the court to identify the funds used must be plainly and fully stated and proven.—53 Ala. 120; 77 Ala. 349. The averments of the cross bill are not definite

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and precise and the proof is not clear.—82 Ala. 318; 53 Ala. 120; 73 Ala. 505. Farrow is a purchaser for value without notice.—75 Ala. 216; 71 Ala. 220; 63 Ala. 561; 76 Ala. 135; 77 Ala. 349; 108 Ala. 493. The wife is estopped in this cause to assert an equity in the land. She induced the loan.—113 Ala. 381; 129 Ala. 619; 95 Am. St. Rep. 680; 86 Ala. 200; Ib. 765.

TYSON, J.—The bill in this cause was filed to foreclose certain mortgages made an exhibit to it executed by the respondent Gilbreath conveying certain lands described in them. On final hearing the chancellor decreed a foreclosure of one of the mortgages, the last executed, which secured a note bearing date February 10, 1902. The respondent, Mrs. Gilbreath, here contends that a portion of the land conveyed by the mortgage in equity belonged to her, notwithstanding the legal title to it was in her husband, her co-respondent, the mortgagor. This contention is based upon the theory that her husband used her money to pay for the land claimed by her and that the complainant is chargeable with notice of her equity growing out of that fact. In other words, she, by her cross-bill, seeks to establish a resulting trust in a certain part of the land conveyed by her husband's mortgage to the complainant. In order to accomplish this, it was incumbent upon her not only to aver the facts out of which the trust originated with distinctness and precision, but to prove the averment by "clear, full and convincing evidence."—*McCall v. Rogers*, 77 Ala., 349; *Shelton v. Aultman*, 82 Ala. 315, 318, 8 South. 232. We have only to direct attention to the averment of the cross-bill to see that they are wholly insufficient, when tested by the rule declared in the cases above cited, to afford the relief sought. Furthermore, if by any sort of construction its averments could be held to be sufficient (which they are not), they are not established by that degree of proof required.

We are next asked to review the order of the chancellor denying the petition of the respondent, Sam Gilbreath, made at a term of the court held subsequent to

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the one at which the final decree was rendered foreclosing the mortgage. The matters involved in that petition, occurring as they did, after the final decree was rendered, as did the ruling on it, are clearly not reversible upon appeal from that decree. And as an examination of the record does not disclose that this appeal was prosecuted from that order, but that it is prosecuted from the decree foreclosing the mortgage, the order is not before us for revision.—*Chicago Portrait Co. v. Robbins*, 42 South.—1. It is not insisted on the part of appellant, Sam Gilbreath, that an error was committed in the rendition of the final decree as to him.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Bill to Foreclose Mortgage.

(Decided July 6, 1906. 41 So. Rep. 941.)

1. *Mortgages; Lands Conveyed; Description.*—A mortgage which described the land as "the mineral land described in" a certain deed, will be construed to mean the land described in the deed which were in fact mineral lands, the deed not particularly describing any certain lands as mineral lands.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. Benners.

Bill by John Vary against R. D. Smith seeking to foreclose a mortgage on certain real estate named in the bill. The facts made by the bill are that Smith was indebted to the Birmingham National Bank, and to secure the same executed a certain mortgage made an exhibit to the bill. Certain deeds referred to in the mortgage in describing the lands are also made exhibits to the bill. It is alleged that the mortgage is unpaid, and that it was

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duly transferred from the Birmingham National Bank to the Alabama National Bank and by that bank to the complainant, who is now the owner of it. The facts relative to the description of the lands sufficiently appear in the opinion. Demurrers were filed to the bill setting up the insufficient description of the lands, and that there were several different estates dealt with in the description, and that it was not pointed out with sufficient clearness just what lands were to be sold in fee, what were mineral lands and what were leased lands, etc. This demurrer was overruled, and the appeal is from the judgment overruling the demurrer.

FRANK S. WHITE & SONS, for appellant.—The land must be sufficiently described in a proceeding of this kind.—9 Ency. P. & P., p. 375.

Under the allegations of the bill and the exhibits, which are a part of the bill, the court is unable to make an order of sale of the lands sought to be made subject to the mortgage, for the reason that it is uncertain just what estate the mortgagor had in the different parcels.

A. LEO OBERDORFER, for appellee.—The bill was not subject to the demurrers interposed thereto.—Sec. 700, Code 1896; 3 Mayfield, 328; *Feno v. Sayre*, 3 Ala. 458; *Emanuel v. Hunt*, 2 Ala. 190; *Johnson v. Beard*, 93 Ala. 96; *Strong v. Waddill*, 56 Ala. 471; 2 Jones on Mortgages, Sec. 1454.

DOWDELL, J.—The bill in this case is filed for the foreclosure of a mortgage on real estate. The bill was demurred to by the respondent, and the present appeal is from the decree of the chancellor overruling the demurrer.

The only question insisted on in argument by counsel for appellant is that raised by the ground of demurrer which challenges the sufficiency of the description in the bill of the land as to which the mortgage is sought to be foreclosed. The land is described with particularity in the third paragraph of the bill. The mortgage, as

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exhibit A, is made a part of the bill. The mortgage describes the land by reference to a certain deed as follows: "I also bargain, sell and convey to the Birmingham National Bank for the purposes aforesaid all right, title and interest that I may have in and to the mineral lands described in said deed above set forth from John K. Ewing, treasurer, to the Birmingham Furnace & Manufacturing Company, recorded in book 82, page 495, in said probate judge's office of Jefferson county, Alabama." The deed referred to is made a part of the bill as Exhibit B. By this deed different interests or estates in different lands are conveyed. In certain described lands the absolute fee is conveyed, while in other lands, only mineral rights are conveyed, and still further, in other and different lands, leasehold interests are conveyed. The lands in said deed conveyed in fee are described by government numbers and boundaries. These are the same lands which are described in paragraph 3 of the bill. The deed does not designate these lands or any portion of them as "mineral" lands. The mortgage (Exhibit A) purports to convey "the mineral lands described in said deed." The bill avers that the lands described in paragraph 3 are the lands conveyed in the mortgage. The point made by the demurrer is that the bill is defective in description in the failure to show what part of the lands described are mineral and which are not, and it is further insisted in argument that the mortgage is void because of indefiniteness in description. The latter proposition, that the mortgage is void because of indefinite description, is untenable. The mortgage conveys "the mineral land described in said deed," and there being no lands particularly described as mineral lands, under the maxim, "*ut res magis valeat quam pereat*," the description in the mortgage will be taken and construed to mean the lands described in the deed that are mineral lands. The mortgage in this respect as to the lands conveyed may be aided by proof aliunde. The demurrer assumes that the Ewing deed referred to in the mortgage describes two different classes of land, mineral and nonmineral. This is an erroneous assumption. The

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deed calls for different tracts of land, but nothing to warrant the above assumption. It cannot be said, as matter of law, from the description in the deed of the different tracts of land, and there are a number of them conveyed in fee, which are mineral lands and which are not. This is a matter of evidence which the complainant is not required to aver in his bill. It may be, when the complainant comes to the proof, that he may be able to show that all of the lands described in the third paragraph of his bill, as to which he seeks a foreclosure, are mineral lands. In any event he would be entitled to a foreclosure as to such as are shown to be mineral lands.

From the view we have taken, it follows that the decree appealed from must be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ.,
concur.

Thomas v. Tilley, *et al.*

Bill to Establish Transfer and Foreclose Mortgage.

(Decided May 9th, 1906. 41 So. Rep. 854.)

1. *Witnesses; Transactions with Deceased Person.*—Under Section 1794, Code 1896, the donee is incompetent to testify as to what occurred between himself and the donor, who had died, concerning the making of the gift.
2. *Gifts; Burden of Proof.*—To establish a gift alleged to have been made by a deceased person, the burden is on the person claiming the gift to show by proof, clear and convincing, that the subject matter had passed to him by valid and effective gift.
3. *Same; Gift Inter Vivos; Quantum of Proof.*—The same quantum of proof is required to support a gift inter vivos, when not asserted until after the death of the donor, as is required in gift causa mortis.
4. *Same; Delivery.*—To constitute a completed gift of personal property, the article must have been delivered to the donee.

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5. *Same; Evidence; Sufficiency*.—While the declarations of the deceased donor are admissible as evidence, they are not sufficient, of themselves, to establish a completed gift.
6. *Same*.—The evidence in this case examined and held insufficient to establish a gift.

APPEAL from Tuscaloosa Chancery Court.

Heard before Hon. A. H. Benners.

Bill by J. M. Thomas v. C. A. Tilly, et al., to establish the transfer of a mortgage and to foreclose the same. The facts are sufficiently stated in the opinion of the court.

HENRY FITTS, for appellant. Declarations of an alleged donor of an intention to give are admissible as tending to establish the gift. And when proof of these declarations is accompanied by proof of the subsequent possession of the thing given, the evidence is sufficient to authorize the presumption that the gift has been made.—*Olds v. Powell*, 7 Ala. 652; s. c.; 9 Ala. 861; *Nelson v. Irerson*, 19 Ala. s. c.; 17 Ala. 222; *Gillespie's Case*, 28 Ala. 561; *Wheeler v. Glasgow*, 97 Ala. 700; *Reid v. Colcock*, 9 Am. Dec. 729; 14 A. & E. Ency. of Law, 1050 and cases cited.

From the declarations of the donor the court and jury are authorized to infer everything that is necessary to the confirmation of a legal gift, including the intention to give, the act of giving, the delivery and the consent to accept.—*Sims v. Sims*, 2 Ala. 117; *Grangil v. Arden*, 10 Johnson, 303; *Reid v. Colcock*, *supra*; *Lord v. Life Insurance Co.*, 56 L. R. A. 597, and authorities cited; Greenleaf Ev. Sec. 147; 16 Cyc. p. 120 and note 29; 14 A. & E. Ency. of Law, 1051.

DANIEL COLLIER, M. T. ORMOND and HENRY A. JONES, for appellees.—The donee was not competent to testify to the declaration of the deceased alleged donor.—Sec. 1794, Code 1896. The delivery of a mortgage only will not carry with it, a note secured thereby so as to perfect the gift; but if both are delivered it will.—*McHugh v. O'Connor*, 91 Ala. 243; 89 Ala. 43. In the absence of the

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proof of an actual delivery the evidence in this case was not sufficient to constitute a valid gift. Authorities *supra*; *Hundley v. Hundley*, 15 Ala. 104; *Sewell v. Glidden*, 1 Ala. 53; *Sims v. Sims*, 2 Ala. 117; *Blakey v. Blakey*, 9 Ala. 391; *Phillips v. McGrew*, 13 Ala. 255; *Walker v. Crews*, 73 Ala. 412; *Brayant v. Ingraham*, 16 Ala. 121. Declarations after the consummation of the gift are inadmissible for the purpose of effecting the gift.—*Gillespie's Case*, 28 Ala. 551. The pretended gift in this case is rendered void by Sec. 1015, Code 1896.

SIMPSON, J.—The original and amended bills in the case, filed by appellant, set up the claim that J. W. Thomas, the father of the complainant, J. M. Thomas, in his lifetime gave to complainant a certain note and mortgage, which is admitted to be due, by J. L. Tilley and C. A. Tilley, defendants; and the prayer is that the court establish the transfer as valid and foreclose the mortgage. The widow and heirs of said J. W. Thomas controvert the fact of the assignment and transfer of said note and mortgage.

The testimony for the complainant, beyond his own, which was properly objected to as violative of section 1794 of the code of 1896, was, first, by the wife of the complainant, who testified that, shortly after the execution of the Tilley mortgage, John W. Thomas told her that he had sold the land to Tilley and taken the mortgage, in order that he might give it to complainant; also that on one occasion her said husband and his father came to her home together; that her husband had the mortgage and note, and handed it to her, telling her to put it away; that she placed it in a trunk, where it remained until after the death of J. W. Thomas; that other papers of J. W. Thomas were subsequently brought by her husband and placed in the same trunk, which are not claimed by said J. M. Thomas; that on the occasion in question said J. W. Thomas remained at his said son's house from Friday evening until Monday morning, and told her several times "that he had given the paper to Johnny," and as he was leaving told her not to let John (her husband) forget to get other papers which he had left at the courthouse, and he told her again as

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he was leaving that he had given the mortgage to John. The note and mortgage were on one paper, and were not indorsed by said J. W. Thomas. A son of the complainant, 20 years of age, testified that he remembered when his grandfather came to the house with his father, and heard him tell his mother "that he had given the Tilley mortgage to my father, in the courthouse." The witness Richard Malone testified that John W. Thomas told him on one occasion that he was going to give some notes, which J. L. Tilley and another had made to him, to his son John M. Thomas, because he had never given him anything, and that he believed he (J. W.) would not live long. He never heard him say that he had given them. He states that said J. W. Thomas made this statement to him once when he was going to market at Tuscaloosa, and another time at said J. W. Thomas' home, and that witness' wife, Roxie Malone, was present on the latter occasion.

Gilbert Meadows, a witness for the defendants, a son-in-law of J. W. Thomas, testified to a conversation with said decedent in January or February, 1901, not long before his death, in which said Thomas wished him to take care of the Tilley mortgage and other papers for him. W. K. White, a witness for the defendants, testified to a conversation in the presence of himself and Capt. James White, between J. W. Thomas and his son, J. M. Thomas, shortly after the Tilley mortgage was made, in which said son was trying to persuade his father to let him have the Tilley land, or land notes, and the father replied that he could not let him have the property, because it would be doing too much for one child and none for the rest. He testified, further, that said J. W. Thomas came to the camp where witness and said Capt. White were on that night, and had a conversation with said Capt. White, in which Thomas said that he did not let his son have the Tilley notes or land, and that he was going to treat all his children alike. Francis Cooper, witness for defendants, testified to a conversation with J. W. Thomas, shortly before he died, in which said Thomas said that he had not given the Tilley mortgage and other papers to his son, but had merely placed them in his hands to take care of them for him,

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and he was afraid his wife would destroy them. Alabama Sullivant, formerly the widow of J. W. Thomas, testified to a conversation between the father and son, just before the former died, in which the father told his son that he wished this Tilley mortgage to be divided between said witness and said J. M. Thomas and his two girl children. Three witnesses testified that Capt. James White died before the time fixed by W. R. White for the conversation between said J. W. Thomas and said Capt. James White. Willey Sullivant testified in a general way to hearing John W. Thomas say he was going to do something for his son J. M., and giving reasons therefor.

The testimony as to the mental condition of J. W. Thomas was conflicting, and probably not sufficient to show that he was incapable of sensibly disposing of his property. The burden of proof was upon J. M. Thomas to show by clear and convincing proof that the note and mortgage which John W. Thomas held against Tilley had passed from said J. W. to him by a valid and effective gift. "The quantum of proof requisite to support a gift in any case is that which, taking into consideration the situation and relation of the parties and the nature of the subject-matter of the gift, clearly and fully establishes every fact necessary to constitute a valid and complete gift."—14 Am. & Eng. Ency. Law (2d Ed.) p. 1049. It is stated, also, that where the claim is not asserted until after the death of the donor the evidence must be as clear, strong, and convincing as in a gift *causa mortis*.—*Id.*, and note 4.

It is undoubtedly the law that, in order to constitute a complete gift of personal property, it is necessary that the article be delivered to the donee. In an early case in this court, where a special verdict was found that O. had executed a deed conveying slaves to his son, and the jury further found that "a formal delivery of the slaves was subsequently made," the court held that not enough to justify a judgment in favor of said donee, but reversed the case, in order that a *venire facias de novo* could be issued.—*Sewall v. Glidden*, 1 Ala. 52.

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Again, where a father called a negro woman into the yard where his daughter was, called witnesses, and said, "In the presence of you all, I give this negro to my daughter Mary," and although he had previously declared his intention to do so, and afterwards referred to his having given the slave to his daughter, this court held that this transaction lacked the essential constituent of delivery to make the gift complete, as the daughter was young, living with her father, and the slave remained with him.—*Sims v. Sims*, 2 Ala. 117. The case of *Blakey v. Blakey's Heirs*, 9 Ala. 391, went off on the point that the party claiming the gift failed to produce a deed of gift which he claimed to have, and that the declarations of the deceased were contradictory, and that it did not appear that he parted with the possession or the right to exercise control. In the case of *Hunley v. Hunley*, 15 Ala. 91, the slaves were worked on the farm of the children's father, in connection with those of the grandfather, who lived with his son, and the grandfather had frequently declared that he "had given them" to said grandchildren; that they belonged to them; and said grandfather and other members of the family frequently pointed them out as the slaves which he had given to said grandchildren. Said children frequently claimed said slaves as theirs, in the presence of their said grandfather, and it seemed to be generally recognized in the family that said slaves belonged to said grandchildren. The grandfather said he had given them to said grandchildren and intended to have a deed recorded to that effect. This court held that the transaction was wanting in the "essential ingredient to consummate the gift, namely, the delivery of the property." While the children's father had possession of the slaves, the court says there was "no evidence that they were delivered to him for any such purpose," and that such declarations ("that he had given the slaves to the children") "cannot constitute a valid gift, in the absence of proof of actual delivery."—15 Ala. 104. In the case of *Wheeler v. Glasgow*, 97 Ala. 700, 11 South. 758, the certificate of deposit was endorsed and delivered to the donee, and a witness testified that the donor used words of gift when he

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handed the same to the donee.—97 Ala. 702, 11 South, 758. Other authorities hold that admissions, while admissible, are not sufficient to establish a completed gift.—14 Am. & Eng. Ency. Law (2d Ed.) p. 1051; *Rooney v. Minor*, 56 Vt. 527. And another case holds that, even where the donee was already in possession, there should be a delivery to him at the time of donation.—*Allen v. Allen* (Minn.) 77 N. W. 567, 74 Am. St. Rep. 442.

Realizing how easy it is, after the death of the supposed donor, to gather up detached expressions, particularly in the presence of interested witnesses, we recognize the wisdom of the rule that strict proof should be made of all the ingredients of a perfected gift before the same can be established. While in this case the proposed donee had possession of the paper, yet it is proved at the same time that he had all the other papers of the decedent in the same trunk, merely for safe-keeping, and, while it is not, in every sense, absolutely necessary that a note should be endorsed (to pass from one to another), yet it is significant in this case as a circumstance. In addition, it may be noted that even the declarations, such as they are, were contradictory. We hold that the evidence in this case was not sufficient to establish the gift, and the decree of the court is affirmed.

Affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ. concur.

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Bill to Enjoin Foreclosure of Mortgage and Declare it a Usurious Contract.

(Decided April 10th, 1906. 140 So. Rep. 655.)

1. *Building and Loan Associations; Membership; Loans; Evidence.*
—Where the proof shows that a party applied for membership in a corporation and received shares and afterwards borrowed money and executed a mortgage, such party occupies a dual

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relation and his contention that the contract is void is not supported by the proof.

2. *Same; Usurious Contract; Premiums; Foreign Law.*—The fact that a premium was charged for a loan made, in Alabama by a Minnesota corporation, did not render the loan usurious, where the Minnesota laws, which govern the contract, expressly provide that premiums shall not make the contract usurious.
3. *Same; Bidding.*—The fact that the money borrowed was not put up to the highest bidder did not render the mortgage invalid or usurious, it having been expressly held otherwise by the Minnesota Court.
4. *Evidence; Foreign Laws; Proof.*—The opinion of the court of a foreign state is properly admitted in evidence to show the construction given the statutes of that state.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. Ferguson.

Action by William G. Beckley against the United States Savings & Loan Company. From a judgment in favor of defendant, plaintiff appeals.

The appellant filed this bill against appellee to enjoin the foreclosure of a mortgage, to declare the same a usurious contract, and for an accounting to ascertain the amount received as loan on the mortgage, together with the payment made on same, and to be relieved of the usury by paying the full amount borrowed, together with such interest as the court should adjudge he ought in equity to pay. The bill also sets up by way of amendment to the original bill a violation or noncompliance by the respondent with the laws of said state, and also that he was not a member of the corporation at the time the mortgage was executed, and that therefore the contract is void.

SAM WILL JOHN, for appellant.—If Beckley was not a member of the corporation the contract is void and cannot be enforced here or elsewhere. Under the evidence it clearly appears that he was not a member when the loan was made, and did not become a member until after that time.—*Falls v. U. S. S. & Co.*, 87 Ala. 426; *Williar v. Balto. B. L. & A. Assn.*, 45 Md. 546; *Cent. B. & L. Asso. v. Lampson*, 60 Minn. 422; *Beckley's Case*, 137 Ala. 129.

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Under the laws of Minnesota, a loan made to a person not a member is void.—*National Investment Co. v. National S. L. & B. Asso.* 40 Minn. 517; *Cent. B. & L. Asso. v. Lampson*, *supra*; Sec. 2794, Gen. Stat. Minn.

WHITE & HOWZE, for appellee.—The present contract is a Minnesota contract and governed by the laws of that State.—*Beckley v. U. S. S. & L. Co.*, 137 Ala. 129. It is not usury to pay assessments on stock regularly and lawfully taken.—*Hughes v. B. & L. Asso.* 124 Ala. 669; *So. B. & L. Asso. v. Anniston*, 101 Ala. 582; *Sheldon's Case*, 121 Ala. 283; *Motes v. People*, 34 So. Rep. 344. There is nothing in the claim of appellant that the contract is invalid because the loan was not put up to competitive bidding.—*Cubbidge v. Napier*, 62 Ala. 520. The opinion of the Minnesota court was competent evidence and properly introduced.—*Cubbidge v. Napier*, *supra*; *Walker v. Forbes*, 31 Ala. 9; *Inge v. Murphy*, 10 Ala. 885.

ANDERSON, J.—This case has been here before, and is reported in 137 Ala. 119, 33 South. 934, 62 L. R. A. 33, 97 Am. St. Rep. 19. This court then held that this was a Minnesota contract and governed by the laws of that State, and we see no reason to depart from the rule then laid down. Indeed, this case seems to have been tried upon that theory, and the appellant has attempted by the amendments and proof to show a violation or noncompliance by the respondent with the laws of said state.

The appellant insists that the contract is void, because complainant was not a member of the corporation at the time the mortgage was executed. This contention is unsupported by the proof. On the other hand, the proof shows that he applied for membership, and received as a member 16 shares of stock in the company, before the mortgage was executed. It would therefore seem that he was a member, and after borrowing the money and executing the mortgage he occupied a dual position. He was a member and a borrower, and each position was separate and distinct from the other.—*Hayes v. Southern Home Building & Loan Association*, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216; *Southern Building &*

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Loan Association v. Anniston Loan & Trust Co., 101 Ala. 582, 15 South. 123, 29 L. R. A. 120, 16 Am. St. Rep. 138.

It is also contended that this loan is usurious, because the premium should be added to and included as a part of the interest. The statute set out in the amendment expressly declares that premiums shall not render the contract usurious. Section 2794, Gen. St. Minn. 1894, as set out in the record (page 61 of the transcript.) It did not render the mortgage invalid or usurious because the money was not put up to the highest bidder. This point has been decided adverse to the appellant in the case of *Zenith Association v. Heimbach*, (Minn. 79 N. W. 609, which opinion was introduced in evidence and appears on page 155 of the transcript. The opinion of the court of Minnesota was properly admitted in evidence to show the construction of the statutes governing the case at bar.—*Inge v. Murphy*, 10 Ala. 885; *Cubbedge v. Napier*, 62 Ala. 518; *Walker v. Forbes*, 31 Ala. 9.

The decree of the city court is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

Esslinger v. Herring.

Decree on Demurrers to Bill.

(Decided June 30th, 1905. 40 So. Rep. 142.)

1. *Appeal; Right of Appeal; Decision Favorable to Appellant.*—A decree sustaining demurrers to a bill, will not support an appeal by respondent to review the reasons given by the chancellor, who sustained certain grounds of demurrer and overruled others, as to the grounds of demurrer overruled, for it is a decree sustaining demurrer, and therefore favorable to appellant.

APPEAL from Madison Chancery Court.
Heard before Hon. W. H. Simpson.

[Esslinger v. Herring.]

Action by Minnie L. Herrin against Emma C. Esslinger. From a decree sustaining a demurrer to the bill. rerespondent appeals.

TANCRED BETTS, for appellant.—Counsel discusses the various questions raised by the pleadings and cite authorities to sustain the same, but does not discuss the points decided.

GRAYSON & GRAYSON, for appellee.—Counsel discuss propositions contained in the pleadings, and cite authorities but do not discuss the point decided.

DENSON, J.—After the bill had been amended the second time the respondent demurred to it, assigning 13 grounds or causes of demurrer. The chancellor sustained the demurrer, and it is from this decree that the appeal is taken by the respondent.

Notwithstanding the decree recites that the demurrer is sustained on specified grounds and overruled as to all others, it is a decree sustaining a demurrer to the bill, and nothing more or less. As was said by this court in the case of *Watson v. Jones Brothers*, 121 Ala. 579, 25 South. 720: "The chancellor's reference to the assignments upon which he rested the decree is the mere giving of his reason for the decree, and his reference to the other assignments is to be taken as a mere expression of his opinion that the bill is not bad for the reasons stated in them." The decree recites that the complainant in open court amended the bill to conform to the ruling of the court on the demurrer, and the respondent was allowed 30 days in which to answer the bill. The respondent, desiring to present for review the questions raised by the grounds of demurrer that were overruled, should, after the amendment was made, have demurred to the bill as amended upon those grounds. And, if the court had then overruled the demurrer to the bill as amended, an appeal from the decree overruling the demurrer would have been proper. But as the record stands the decree appealed from is favorable to the respondent, and she cannot complain of it. It follows that the appeal must be

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dismissed.—*Watson v. Jones Brothers, supra*; *Kinney v. Reers & Co.*, 139 Ala. 240, 25 South. 834; *Cottingham v. Greely*, 123 Ala. 479, 26 South. 514; *Coleman v. Butt*, 130 Ala. 266, 30 South. 364; *McDonald v. Pearson*, 114 Ala. 630, 21 South. 534.

Appeal dismissed.

MCCLELLAN, C. J., and DOWDELL and ANDERSON, JJ., concur.

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Bill to Declare a Deed a Mortgage and to Redeem.

(Decided April 3, 1906. 40 So. Rep. 504.)

Mortgages; Absolute Deed as Mortgage; Jurisdiction of Equity.—If one gives a deed to land and takes an agreement to have a reconveyance of the land on the payment of a sum certain, and pending payment, which is made when due, the grantee collects rents on the land, the grantor is entitled in equity to enforce a repayment of the rents against the grantee, having no adequate remedy at law.

APPEAL from Autauga Chancery Court.

Heard before Hon. W. W. Whiteside.

Bill by Julia A. Thomas to enforce the collection of a sum of money collected by Livingston as rent for the previous year. The facts sufficiently appear in the opinion of the court.

GUNTER & GUNTER, for appellant.—For a full treatment of the question presented by this appeal, we refer to: 2 Jones on Mortgages, Chapt. 23, Sec. 1114, et seq.

RUSHTON & COLEMAN, for appellee.—A court of equity will not take jurisdiction if there is a clear, complete and adequate remedy at law. If equity has jurisdiction of the cause, then, the defendant is deprived of his

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constitutional right of trial by jury.—*Va. & Ala. M. & M. Co. v. Hale*, 93 Ala. 524; *Am. R. & C. Co. v. Linn*, 93 Ala. 610; *McCaic v. Barker*, 115 Ala. 543; *Youngblood v. Youngblood*, 54 Ala. 486; *Brown v. Brown*, 68 Ala. 114; *Smith v. Cockrell*, 66 Ala. 64; *Moulton v. Reid*, 54 Ala. 320; *Kennon v. Wright*, 70 Ala. 434.

WEAKLEY, C. J.—In *Reeves v. Abercrombie*, 108 Ala. 535, 19 South. 41, we collected and classified our previous decisions in cases where bills had been filed in equity to declare to be mortgages deeds which on their face appeared to be absolute and unconditional; and the jurisdiction of the chancery court was declared to exist in such cases to grant relief, and upon parol testimony alone, when it is clear and convincing. The power of the court is none the less ample, where the transaction is in fact, and was intended by both parties to be, a mortgage to secure a continuing debt, although there was a contemporaneous separate agreement binding the grantee in the absolute deed to reconvey to the grantor upon the terms and within the time specified in such agreement. And this is true, when the deed and agreement, construed together, import upon their face a sale with a mere right of repurchase.—*Vincent v. Walker*, 86 Ala. 333, 5 South. 465; *Mitchell v. Wellman*, 80 Ala. 16; *Douglass v. Moody*, 80 Ala. 61. Upon satisfactory proof a court of equity will grant relief in such cases, whether the contemporaneous collateral agreement be oral or written; it being necessary for the court, under the established rules as to the measure and burden of proof, to reach the conclusion that the transaction in its entirety was intended by both parties to afford a mere security for a debt the grantor in the absolute conveyance continues to owe the grantee. And when the writings in one or separate instruments express a conditional sale, or a sale with the right of repurchase, or where it is admitted or shown by parol that there was a contemporaneous agreement to reconvey or another agreement different from that expressed in the writing or writings, the court, in weighing the evidence tending to show the

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transaction was a mortgage is, in the interest of complete justice, inclined to treat the parties as mortgagor and mortgagee, and will resolve the doubt in favor of that relation. *Turner v. Wilkinson*, 72 Ala. 361; *Douglass v. Moody*, 80 Ala. 61; *Crosby v. Buchanan*, 81 Ala. 574, 1 South. 898; *Williams v. Reggan*, 111 Ala. 621, 20 South. 614.

Although the general rule is that parol evidence will not be received to vary the legal effect of written instruments, yet in this class of cases the chancery court takes jurisdiction upon the ground that it will enforce as a trust the agreement of the grantee that the deed shall operate as a mortgage, and also upon the ground that it would be a fraud to allow the grantee to repudiate the collateral parol undertaking.—*English v. Lane*, 1 Port. 328. The appropriate relief can be obtained only in a court of equity. When the jurisdiction of the chancery court attaches upon one or more grounds of equitable cognizance, it is elementary that the court, in awarding relief, will seek to do complete justice. Hence, when the court concludes and declares that the real transaction constituted the parties mortgagor and mortgagee, it will state an account between them on the basis of that relation, and will allow redemption on full payment of the debt, with the consequent cancellation of the deed as a cloud on the grantor's title.

In the case before us the grantee reconveyed to the grantor, and the controversy is presented in a different form from that usually found in disputes of the general nature above discussed. We will briefly summarize the allegations of the bill in narrative form: The complainant executed to the defendant an absolute deed, with covenants of warranty on the recited consideration of the receipt by her of a sum of money, and he contemporaneously made a written agreement with her, the sum and substance of which was that, if she "should pay the said sum expressed as the consideration of the said conveyance to the said George Livingston within 12 months or a date within a year, he would reconvey said land." She remained in possession, but the grantee, upon his

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demand, collected from a tenant the rent for 1904. Within the year she paid Livingston the amount stated in the agreement, with interest, and he executed to her a reconveyance, but refused to pay or account to her for the rent collected. The bill alleges that the said transaction was, in equity, a mortgage and that it was not understood by the defendant to have been a sale; the deed having been taken because he supposed it gave him a better opportunity to obtain the land by a technical default in the payment of the debt. The prayer of the bill is for a decree for the rent, with interest, and for such other and further relief as the nature of the case may entitle her to obtain. The chancellor, on motion, dismissed the bill for want of equity.

The sole contention in support of the decree is that the complainant had a clear, adequate and complete remedy at law, and that defendant would be deprived of his constitutional right of trial by jury if the chancery court should grant relief by requiring him to pay her the rent collected, with interest. We cannot concur in this contention. In a court of law, the deed, notwithstanding the agreement to reconvey for a stipulated sum, would have entitled the defendant to collect and retain the rents as owner. It is true the complainant might have filed a bill to redeem and had the amount to be paid on redemption reduced by the application thereto by way of equitable set-off of the sum collected as rent. The law, however, did not itself apply the rent to the debt, and the complainant might well pay the stipulated amount (exactly equaling the sum she borrowed), with interest and attorney's fees, and thus obviate the danger, in any event, of losing her lands, then proceed in a court of equity to have her deed declared to have been all the while a mortgage, and in the same suit obtain a personal decree for the rent, which, upon the facts alleged in the bill, she ought to be paid, with interest.

If the complainant had executed a mortgage in the usual form, to secure her debt, and had fully paid the mortgage, without abatement or credit on account of the rent collected by the mortgagee, she could have

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maintained an action at law to recover the amount overpaid as for money had and received.—2 Jones on Mortgages, § 1116. The remedy at law would have been adequate, in that event, because parol evidence would not have been necessary to show she had executed a mortgage. The fact would have been apparent on the face of the instrument. Here resort to equity was necessary to obtain, upon parol evidence and upon principles obtaining in the equity court, a decree that would alter the legal effect of the writings and give them their intended operation and effect; and, having preliminarily secured this result, she will be allowed its fruits in the form of a decree for the sum due her with interest. The special and general prayers were sufficient to authorize all the relief that was necessary or desired.

The defendant should be put to a further defense of the bill. Error was committed in dismissing it out of court. The decree of the chancellor will therefore be reversed, and one here rendered overruling the motion to dismiss and remanding the cause for further proceedings.

Reversed, rendered and remanded.

TYSON, SIMPSON and ANDERSON, JJ., concur.

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Bill to Redeem Land or Have it Sold Free From Claims of Respondents.

(Decided Jan. 30, 1906. 40 So. Rep. 120)

1. *Justices of Peace; Jurisdiction; Enforcement of Mechanic's Lien.*—The jurisdiction to entertain a suit for the enforcement of a mechanic's lien by a Justice of the Peace is purely statutory.
2. *Same; Statutes; Construction.*—Section 2733 of Code of 1896 does not confer jurisdiction on Justices of the Peace to render judgment enforcing a mechanic's lien, where the amount of same exceeds fifty dollars, and a judgment rendered by a Justice of the Peace to enforce such a lien, where the amount involved exceeds fifty dollars, is a nullity.

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APPEAL from Covington Chancery Court.

Heard before Hon. W. L. Parks.

Bill by Falkenberry against Tolbert, *et al.*, to redeem land or for a sale of same free from encumbrance on part of claims of respondents.

The facts on which relief is sought, the allegations of the bill and the questions raised on demurrer thereto are sufficiently stated in the opinion of the court.

POWELL & ALBRITTON, and C. E. HAMILTON, for appellant.—The right to establish a materialmans lien is dependent upon the statute.—*Globe I. R. & C. Co. v. Thatcher*, 87 Ala. 465. The allegations of the bill fail to show that the proceedings were had as required by the statute.—Sections 2727 and 2746. The bill affirmatively shows that the justice of the peace who rendered the judgment fixing the lien was without jurisdiction to do so.—Sec. 2742, Code 1896.

The judgment is void for another reason. The judgment entry recites that it is the opinion of the court that the plaintiff have and recover of the defendant, *etc.*—*Thompson v. Maddox*, 105 Ala. 426; *Richardson v. Peagler*, 111 Ala. 478. A void judgment may be attacked collaterally.—1 Black on Judgments, Sec. 278.

J. J. PAYNE and RILEY & WILKERSON, for appellee. No brief came to the Reporter.

HARALSON, J.—The complainant below J. H. Falkenberry, appellee, here, bases his right to relief upon the grounds, as alleged, that he furnished to the defendant Stewart, certain materials for the erection of a house upon the land, for which he claims a material-man's lien, which, by proceedings set out in the bill, he attempted to perfect. He alleges, he brought suit in the court of a justice of the peace, upon the account for the payment of which he sought to have declared a lien on the land on which the house was built and to have the same enforced; that he recovered a judgment in said court of the justice of the peace for the sum of \$68.54 and the costs of suit, and a lien was declared on the property described, and

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the same was condemned to sale for the satisfaction of said judgment, and that said judgment was certified to the clerk of the circuit court, who entered the same on the execution docket of said court and issued a venditioni exponas to the sheriff, directing him to sell said house and lot for the satisfaction of said judgment and costs. It appears, that the sheriff, obeying this writ, proceeded regularly to sell the property, and complainant became the purchaser thereof for \$88.81, the amount of said judgment and costs, and the sheriff executed and delivered to him a deed conveying to him the interest of said Stewart in said property. It is under and by virtue of this conveyance that the complainant derived any right or title to the property in question, and on which he bases his right to redeem the same, or to have it sold free from the claims of defendants therein.

The defendants demurred to the bill as amended on many grounds, among them being the one, that set up in substance that J. M. Snead, a justice of the peace who rendered the judgment and declared a material-man's lien for its enforcement, had no jurisdiction to render said judgment, and establish such lien.

The jurisdiction of a justice of the peace to render a judgment and declare a lien of this character is wholly a creation of statute. Until the passage of the statute embodied in Section 2733 of the Code of 1896, a justice was without any jurisdiction in such matters. That section provides that "where the amount involved exceeds fifty dollars, actions for the enforcement of liens under this article may be brought in the circuit court, or court having like jurisdiction, or in the chancery court of the county in which the property is situated, and when resort is had to the chancery court, no special ground of equitable jurisdiction need be alleged or proved. In all other cases actions to enforce such liens shall be brought before justices of the peace." We are of the opinion, that when the amount of the claim exceeds fifty dollars, as in this case, a justice of the peace is without any jurisdiction to entertain an action for the enforcement of a mechanic's or material man's lien, and to render a judgment looking to the enforcement of said lien.

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The bill was subject to the demurrer interposed to it, and the chancellor erred in overruling the same and in not dismissing the bill for want of equity. A decree will be here rendered reversing the decree below sustaining the demurrer to the bill and dismissing the same for want of equity.

Reversed and rendered.

TYSON, DOWDELL, SIMPSON, ANDERSON, and DENSON, JJ., concur.

Montgomery, *et al.* v. Perryman & Co.

Bill to Reform a Mortgage.

(Decided May 8th, 1906. 41 So. Rep. 838.)

1. *Insane Persons; Guardian; Instructions from Court.*—Where the guardian of an insane person executed a mortgage on the property of the insane person under a decree of the chancery court, such guardian had the right to apply to such court for instructions and authority necessary to execute the trust, as other trustees.
2. *Same; Sale of Property of Ward; Confirmation.*—The title of the property of the ward being not in the guardian, but in the ward, when sold under a decree of the court, the court becomes the vendor, and until confirmed by the court the sale is incomplete and confers no rights on the purchaser.
3. *Same; Mortgage of Ward's Property; Confirmation by Court.*—Where a decree was entered by the court authorizing the mortgaging of the ward's property but the property to be mortgaged was not designated by the decree, but left to the selection of the guardian, such mortgage is void, unless the making thereof is reported to and confirmed by the court.
4. *Reformation of Instruments; Validity.*—The mortgage being void, in that its making was never confirmed by the court granting the right to execute it, it could not be made the basis of a bill to correct mistakes of description therein.

APPEAL from Jefferson Chancery Court.
Heard before HON. A. H. BENNERS.

[Montgomery, *et al.* v. Perryman & Co.]

This was a bill filed by the transferee of the mortgage in a mortgage executed by guardian for a non compos, and sought to reform the mortgage so as to make it convey the property intended thereby to be conveyed originally. The allegations of the bill and its purpose are sufficiently stated in the opinion. The bill was filed against the guardian and the non compos, and demurrers were interposed to the bill by the guardian ad litem of the non compos, and are as follows: "There is no equity in said bill. Complainant is not the equitable owner of said lot 13, block 9. Want of jurisdiction in the court to render the decree permitting the guardian to mortgage the ward's property. The execution of said mortgage was never confirmed or approved by the city court of Birmingham. The power of sale contained in said mortgage was given without authority upon the part of said Strange to grant the same." These demurrers were overruled and from the decree the guardian ad litem prosecutes this appeal.

GEORGE HUDDLESTON, for appellant.—A court of equity has no jurisdiction to order the sale of a lunatic's land for the payments of his debts in the absence of some alleged special equitable ground.—*Whetstone v. Whetstone*, 75 Ala. 495; *Williamson v. Berry*, 8 How. 556; *Loscy v. Stanley*, 147 N. Y. 570.

A judicial sale is not complete until confirmed and a mortgage made under a decree of court as governed by the same rule.—*Haralson v. George*, 56 Ala. 295; *Bland v. Bourie*, 53 Ala. 152; *Ex parte Branch*, 63 Ala. 388; *Hutton v. Williams*, 35 Ala. 503; *Phillips v. Benson*, 82 Ala. 500; *McEachin v. Warren*, 92 Ala. 554; 17 A. & E. Ency. of Law, p. 989.

The authority to execute a mortgage merely does not authorize the insertion of a power of sale in the mortgage.—*Clark v. Royal Panopticon*, 4 Drew 26, s. c. 27 L. J. Ch. 207; *Capron v. Attleborough Bank*, 11 Gray, 492; *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151. A mortgage executed under a decree of court cannot be reformed.—*Dial v. Gambrel*, 126 Ala. 151; *Stephenson v. Harris*, 131 Ala. 471.

[Montgomery, *et al.* v. Perryman & Co.]

A suit to reform a conveyance for mistake cannot be maintained by anyone who has not succeeded to all of the interest of the original grantee.—*Tillis v. Smith*, 108 Ala. 264; 18 Ency. of P. & C. p. 795.

L. C. DICKEY and JAMES A. MITCHELL, for appellee.—The jurisdiction of equity to reform and correct deeds, mortgages and other instruments is well established, and extends to cases where parol testimony will be necessary to show the mistake in question.—2nd Pomeroy Eq. Jur., §§ 866 and 1376. Equity will even reform a mortgage on a homestead by correcting or perfecting the description of the lands conveyed.—*Gardner v. Moore*, 75 Ala. 394; *Withington v. Mason*, 86 Ala. 345; *Parker v. Parker*, 88 Ala. 252. Where there is a mistake in a series of conveyances, the last grantee may have the conveyance corrected.—*Tillis v. Smith*, 108 Ala. 276. Where lands have been sold under a power in the mortgage and the fairness of the sale was not impugned nor sought to be set aside, the court may confirm the sale.—*McGhee v. Lehman*, 55 Ala. 316; *Dozier v. Mitchell*, *Ib.* 511. The purchaser may have the mortgage reformed after foreclosure under the power of sale.—*Greene v. Dickson*, 119 Ala. 346. As to the power of the court to divest title out of the person holding the same, see the following: *Stewart v. Stokes*, 33 Ala. 498; *Wilson v. Jasper*, 13 S. W. Rep. 885. The court of equity clearly has power to order a sale or mortgage of real estate of persons of unsound mind.—10 Ency. P. & P. p. 1235.

TYSON, J.—The bill in this cause was filed to reform a mortgage executed by the guardian of a non compos mentis under the decree of the city court of Birmingham in equity. The decree authorized the guardian to borrow the sum of \$300 to be used by the guardian in paying the taxes and other necessary and proper expenses of his ward, and further authorizing him, if necessary, to secure the payment of such loan by the execution of a mortgage on such part of the ward's estate as should be reasonable security for the payment of the note for the sum borrowed. The decree further provided that the cause in which it was rendered should be continued, that

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such orders and decrees might be made therein as should seem meet and proper. No other orders or proceedings were had, and on the 13th day of November, 1893, the city court of Birmingham rendered a decree dismissing said cause.

It appears from the bill that W. W. Montgomery, the non compos, owned two lots, Nos. 13 and 14, in block 9, in J. W. Montgomery's addition to Wood Lawn, Ala. On lot 13 there were some improvements, but lot 14 was unimproved, and was worth in the year 1892, when the mortgage was executed, only about \$25. The guardian borrowed \$300 from Mrs. M. E. Jennings, securing the same by a mortgage to her conveying, with other property, lot 14, whereas lot 13 was intended. The sufficiency of the averment showing the mistake is not questioned. The bill further avers that the money borrowed was used for the benefit of the ward, as provided in the decree; that a mortgage upon lot No. 13, with the other property embraced therein, was a reasonable security, and not more than a reasonable security, for the loan, and that lot No. 14, and said other property, was in no sense a reasonable security therefor. The mortgage as executed was duly foreclosed, the mortgagee buying in the property at the foreclosure sale; the mortgagee going into possession of lot No. 13 and using the same as her own. Thereafter on the 14th day of October, 1899, Mrs. Jennings executed a deed to complainant to lot No. 14 for the sum of \$500; complainant going into possession of lot No. 13 thereunder, and improving same to the extent of \$650. R. B. Montgomery, the succeeding guardian, and the non compos mentis, were made parties defendant; the latter demurring to the bill by his guardian ad litem.

The guardian of the non compos, who executed the mortgage under the decree of the city court of Birmingham in equity, had the same right to apply to such court for instructions and authority necessary in the execution of his trust as is accorded to other trustees. The title to the real estate of the ward is not in the guardian, but in the ward, and in the case of a sale thereof under

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a decree of the court of chancery the court is the vendor. In such case "until confirmed by the court it is not complete and confers no rights."—*McEachin v. Warren*, 92 Ala. 558, 9 South. 197. This is true, whether the sale is public or private. A mortgage of the ward's property depends for its efficacy upon the transfer of title and unless the property to be mortgaged is described in the decree, or when the selection of the property is left to the guardian, unless the mortgage is confirmed by the court, its approval is in no way manifested, so as to make the mortgage its act. In such case the mortgage is invalid and confers no rights, even if the property intended to be covered is correctly described therein. It cannot, therefore, be made valid by means of mistake in such a description. The bill shows that the property of the non compos intended to be mortgaged was never designated by a decree of the court; but the selection thereof was left to the guardian, and no confirmation by the court is shown. The mortgage, therefore, confers no rights, and cannot be made the basis of a bill for the correction of a mistake therein. In short, there is lacking that essential element of mutuality between the owner of the property or any one authorized to bind him and the mortgagee upon which to found the reformation or correction.—*Stephenson v. Harris*, 131 Ala. 470, 31 South. 445; 6 Pom. Eq. Jur. § 675 et seq.

The demurrer interposed to the bill should have been sustained. A decree will be here entered, reversing the decree appealed from and sustaining the demurrer.

Reversed and rendered.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.

[Hays v. Bouchelle.]

Hays v. Bouchelle.*Bill to Establish Confused or Obliterated Boundary.*

(Decided May 31st, 1906. 41 So. Rep. 518.)

1. *Boundaries; Establishment; Equitable Jurisdiction.*—The jurisdiction of chancery to establish disputed boundaries not being original or independent, a court of chancery will not undertake to establish obscured or confused boundaries in the absence of some equity superinduced by the acts of the parties, or those through whom they claim.
2. *Bill; Allegation; Sufficiency.*—A bill alleging that complainant purchased of respondent, who was the owner of Sections 20 and 21, Section 20, and received a deed to all of Section 20, named township and range; that while said two sections belonged to respondent, or those under whom she claimed, the boundary line between the sections was destroyed; that such destruction was caused by the negligence of respondent, or those under whom she claimed; that the boundary was obliterated at the time of the purchase, which fact was unknown to complainant; that respondent continues to own Sec. 21; that respondent, at the time of the sale, did not point out the boundary to complainant, and refuses to do so, although requested; that complainant has attempted to have the boundary marked by a surveyor, but has been prevented by threats of violence from respondent, makes a case for equitable interference and establishment of boundary, respondent's acts being a fraud upon complainant.

APPEAL from Greene Chancery Court.

Heard before HON. THOMAS H. SMITH.

This was a bill filed by E. F. Bouchelle to establish the boundary line between certain lands described in the bill. C. O. Hayes was made the party respondent and demurred to the bill, and from a decree overruling the demurrers this appeal is prosecuted. The facts are sufficiently stated in the opinion of the court.

MAYFIELD & VERNER, for appellant.—The jurisdiction of chancery to establish disputed boundaries is not an original or independent jurisdiction but is incidental

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and in addition to the disputed or confused boundary, some special equitable ground must exist.—*Stewart v. Coalter*, 15 Am. Dec. 745 and note; *Ashurst v. McKenzie*, 92 Ala. 484; *Norris's Appeal*, 64 Pa. St. 275. Alabama is without statutes on this subject and the proceedings in this case are governed by common law rules.—Authorities *supra*. In the absence of special equitable ground courts of law are the proper tribunals for the establishment of disputed boundaries.—Authorities *supra*; *Kittell v. Jensen*, 37 Neb. 685; *Lewis v. Lewis*, 4 Ore. 177. Mere fraud or neglect of duty on the part of one adjoining land owner will not give a court of equity jurisdiction to establish the boundaries unless such fraud or negligent act violated some equitable right for which a remedy in equity would be necessary.—*Pendry v. Wright*, 20 Fla. 828; *Daugette v. Harte*, 5 Fla. 215. Note to 15 Am. Dec. 745.

HARWOOD & MCKINLEY, for appellee.—The jurisdiction of chancery to establish disputed boundaries is ancient and well defined, and will be exercised when the obliteration or confusion has resulted from the act of the defendant in fraud of the complainant's rights.—*Ashurst v. McKenzie*, 92 Ala. 484; *Guice v. Barr*, 130 Ala. 570; 1 Storey's Equity Jr. §§ 619-621; 5 Cyc. 951. But the law does not require that the confusion or obliteration of the line be confined to the defendant alone—it is sufficient if it be caused by the fraud or neglect of "those under whom she claims."—Bispham's Princ. Equity, 46; *Hough v. Martin*, (N. Car.) 34 Am. Dec. 406.

The defendant, by prohibiting the running and locating of the line has ratified the acts of those who did obliterate it—and by secretly marking out the false line and taking possession of and claiming all the land east of it (a part of which belonged to the complainant) she has herself been guilty of a fraud—in other words, has fraudulently confused the boundary.—*Guice v. Barr*, 130 Ala. 570; *Ashurst v. McKenzie*, 92 Ala. 484; 5 "Cyc." 951; *George v. Thomas*, (Tex.) 67 Am. Dec. 612; *Gunter v. Ulrich*, (Mich.) 33 Am. Dec. St. Rep. 32; *Kennedy v. Kennedy*, 2 Ala. 593.

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It was unnecessary to allege that the location of the boundary line was unknown to the defendant.—*Guice v. Barr*, 130 Ala. 570.

It was not only proper, but necessary, that the bill should allege that the respondent was in possession of some part of the complainant's land.—*Wake v. Conyers*, 1 Eden 331; 2 Lead. Cas. Eq. 318; *Ashurst v. McKenzie*, 92 Ala. 484

As to that portion of section 20 of which the respondent retained possession, after the sale to complainant—the respondent held same as the tenant of the complainant, and it was her duty to preserve the boundaries.—*S. & W. R. R. Co. v. Yancy*, 101 Ala. 238; note to *Stewart v. Coalter*, 15 Am. Dec. 751; *Ashton v. Lord Exeter*, 6 Ves. 293; 1 Storey's Eq. Jur., § 620; *Attorney Gen. v. Fullerton*, 2 Ves. & B. 263.

DOWDELL, J.—The appeal in this case is prosecuted from the decree of the chancellor, overruling the defendant's demurrer to the complainant's bill. The purpose of the bill is to establish the boundary of the land in question, which the bill alleges has been obliterated and become confused. In an elaborate note by Mr. Freeman to the case of *Stuart's Heirs v. Coalter*, reported in 15 Am. Dec. 745, where many cases bearing on the subject are cited, the equitable doctrine in regard to the confusion of boundaries has been ably reviewed and in a most exhaustive manner, and from this review of the authorities the doctrine may be well stated as follows: The jurisdiction of chancery to establish disputed boundaries of land is ancient and well-defined; but it is not an original or independent jurisdiction and "it is accordingly settled, as laid down in the principal case, that a court of chancery will not undertake to settle obscured or confused boundaries of land unless some equity is superinduced by the act of the parties or of those through whom they claim." See authorities cited in note on page 746 of the above case.

According to the averments of the bill in the case at bar, the respondent, being the owner of sections 20 and

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21, which she had owned and been in possession of for 39 years, sold and conveyed section 20 to the complainant, a copy of which deed is attached as an exhibit to the bill. By this deed, in the description of the land conveyed, no boundaries are given, but the land is merely described as being "all of section 20" in a certain township and range in Greene county, Ala. The bill avers that during the time that said two sections of land belonged to the respondent, or those under whom she derived her title, the corners and boundary line between said sections were lost, obliterated, and destroyed; that such loss, obliteration, or destruction of said corners and boundaries were caused and allowed by the design, act or negligence of respondent, or of those under whom she claimed said lands; that said corners and boundaries were lost and obliterated at the date on which respondent sold and conveyed said land to complainant, but that the complainant was then ignorant of this fact. The bill further avers that the respondent has been, since the sale by her of said section 20 to complainant, the owner of said section 21, and is still the owner thereof; that the respondent did not at the date of said sale point out to complainant the corners and boundaries of said land sold him, and has not since that date done so, although complainant has requested her so to do. The bill further shows, by its averments, that the complainant employed the county surveyor of Greene county for the purpose of locating and ascertaining the boundary line between section 20 and 21, but was prohibited by the respondent, through her agents, by threats of violence, from ascertaining and locating the corners and boundary line between said sections 20 and 21.

It was undoubtedly the duty of the respondent to have put the complainant in possession of the land, which she had sold and conveyed to him, and likewise a duty to have pointed out the boundary line of the land so conveyed, or at least to have permitted her grantee by a proper survey of the land so conveyed to ascertain the correct boundary. We are clearly of the opinion that, if the allegations of the bill are true as to the acts and

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conduct of the respondent, when taken in connection with the averments as to the obliteration and confusion of the boundary line, then the equity of the bill under the authorities is put beyond all question, and the case is one that calls for the interposition of a court of chancery. The acts and conduct of the respondent, charged in the bill, in equity amount to a fraud upon the rights of the complainant, and is such an equity, superinduced by the act of the party, as gives the court jurisdiction under the authorities above referred to. We think the doctrine laid down in our own case of *Ashurst v. McKenzie*, 92 Ala. 484, 9 South. 262, and *Guice v. Barr*, 130 Ala. 570, 30 South. 563, are authorities in support of the complainant's bill. Our conclusion is that the chancellor properly overruled the demurrer, and his decree will be here affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

Reynolds, et al. v. Lawrence.

Bill to Enforce Vendor's Lien and Enjoin Waste.

(Decided April 10, 1906. 40 So. Rep. 576.)

1. *Pleadings; Bill; Amendment; Departure from Original Cause.*—Where a bill was filed to enforce a vendor's lien, describing the land by half and quarter sections, and a copy of the deed was attached and made a part of the bill, describing the lands as described in the bill, it was not a departure from the original bill to permit an amendment which sought to explain and make clear just how much and what lands were sought to be conveyed by the deed.
2. *Evidence; Parol Evidence; Varying Terms of Deed; Patent Ambiguity.*—While it is a general rule that patent ambiguity in the face of a deed cannot be made certain by parol testimony, yet, as the deed, and the intention of the parties in making it, must be determined by the court, the court is entitled to all the circumstances attending the parties in making the

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deed to enable it to arrive at their intention; especially when, as in this case, the ambiguity is of the middle class, partaking of the nature of both latent and patent ambiguities.

3. *Same; Description of Property.*—Where a deed conveying land described it as north half and northeast fourth of northwest fourth of Section 29, parol evidence was admissible to show that the parties intended to convey north half of northwest fourth and northeast fourth of northwest fourth of Section 29.
4. *Deeds; Construction; Lands Conveyed.*—Where the deed stated that the land conveyed contained 100 acres and described it as south half and northeast fourth of northwest fourth, Sec. 29, and an undivided half interest in southwest fourth of southwest fourth, Sec. 28, and south half of southwest fourth of northwest fourth, Sec. 23, and the amendment alleges that it should be described as south half of northwest fourth, northeast fourth of northwest fourth, Sec. 29; south half of southwest fourth of northwest fourth, Sec. 23, and half interest in southwest fourth of southwest fourth, Sec. 28, held, that to harmonizé the recitals of the deed and make it speak the truth in its averments, that construction that makes the description and the given number of acres agree should be adopted.
5. *Waste; Holder of Vendor's Lien Entitled to Have it Restrained.*—A vendor with a lien for purchase money may maintain a suit to stop waste upon the land pending the payment of the purchase money.
6. *Vendor's Lien; Enforcement; Statute of Limitations.*—The statute of limitations of ten years has no application as a defense to an action to enforce a vendor's lien.
7. *Vendors and Purchasers; Parties.*—All subpurchasers of parts of a tract of land are proper parties defendant to a bill to enforce a vendor's lien on the whole tract.
8. *Appeal; Assignment of Error; Sufficiency.*—An assignment of error that the court erred in overruling a demurrer to the bill and denied defendant's motion to strike parts of the bill is too general, and will not be considered.
9. *Same; Discretion of Lower Court; Motion to Strike; Review.*—Motion to strike certain parts of the pleadings is addressed to the sound discretion of the trial court, and its action thereon will not be reviewed on appeal.

APPEAL from Cherokee Chancery Court.
Heard before HON. W. W. WHITESIDE.

[Reynolds, et. al. v. Lawrence.]

Bill by James R. Lawrence as administrator v. John H. Reynolds, et als., to restrain waste by cutting timber upon certain lands and to enforce a vendor's lien on certain lands described. There was a decree for complainant from which this appeal was prosecuted. The facts are sufficiently stated in the opinion of the court.

BURNETT, HOOD & MURPHREE, for appellants.—There was a patent ambiguity in the description of some of the lands, and it cannot be explained by parol evidence.—*Chambers v. Ringstaff*, 69 Ala. 140; *Gilmartin v. Wood*, 76 Ala. 209. Complainant has not the right to make respondent produce the deed.—*E. T. Va. & Ga. R. R. Co. v. Davis*, 91 Ala. 620. The chancellor should have dissolved or modified the injunction which prevented the removal of the wood already cut.—*Watson v. Hunter*, 6 Johnson's Chanc. 159; *Wyck v. Alleger*, 6 Barbour 507; 9 Am. Dec. 295; 10 A. & E. Ency. of Law, p. 821.

KNOX, ACKER & BLACKMON, for appellee.—There was no such ambiguity in the description of the lands as to cut off parol evidence to explain it.—*Chambers v. Ringstaff*, 69 Ala. 140; *Moody v. A. G. S. R. R. Co.*, 124 Ala. 195; *Webb v. Elyton Land Co.*, 105 Ala. 4471; 76 Ala. 209. The number of acres mentioned in the deed together with the description by government subdivisions shows that the deed should be corrected.—*Woolfe v. Dyer*, 95 Mo. 545; *Davis v. Hess*, 15 S. W. 324. There was no departure in the amendment.—*Fields v. Drennan & Co.*, 115 Ala. 558; *Romanoff Mining Co. v. Cameron*, 137 Ala. 214; *Milner v. Stanford*, 102 Ala. 277. A vendor out of possession with a claim constituting a lien upon land may enjoin a waste committed thereon.—*Moses Brothers v. Johnson*, 88 Ala. 517; *King v. Smith*, 2 Hare, 239; *Coker v. Whitlock*, 64 Ala. 180. The statute of limitations of ten years does not arise in this case.

SIMPSON, J.—This was a bill to enforce a vendor's lien and to enjoin the cutting of timber on a part of the land originally sold by Lawrence to the land company,

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and on which the lien is claimed, as the S. 1-2 and N. E. 1-4 of N. W. 1-4, Sec. 29, T. 9, R. 10 W.; also the S. 1-2 of S. W. 1-4 of N. W. 1-4, Sec. 23, T. 9, R. 10; also an undivided half interest in S. W. 1-4 of S. W. 1-4, Sec. 28, T. 9, R. 10; and the deed attached as an exhibit gives the same description. The amendment to the bill seeks to explain this description by alleging that the lands conveyed were the S. 1-2 (of the N. W. 1-4) and the N. E. 1-4 of N. W. 1-4 of said section 29; also claims that an inspection of the original deed, which is in the possession of defendants, will make the matter clear, and seeks to require defendants to produce it. The amendments, seeking to make clear the lands intended to be conveyed, did not constitute a departure from the cause of action as stated in the original bill.

The only ambiguity which is claimed to exist is from the description of the land as "the S. 1-2 and the N. E. 1-4 of N. W. 1-4 of Sec. 29," and the amendment seeks to make it clear that the S. 1-2 referred to the S. 1-2 of N. W. 1-4 and not the S. 1-2 of the section. While it is a correct general principle of law that, if an ambiguity is patent on the face of the deed, it cannot be made certain by parol proof as to what was the intention of the parties, but the instrument must be construed by the court, yet the court is entitled to the light of all the circumstances surrounding the parties, in order to enable it to determine the property intended to be conveyed by the deed. This has been called an intermediate class, partaking of the nature of both patent and latent ambiguity; and this court, speaking through Justice Stone, has clearly expressed this distinction, in a case where lands were described by government numbers, yet failed to state in what county or state they were situated, and proof was permitted to be made of the fact that the party making the deed was living in a certain county in Alabama, on lands answering to said description.—*Chambers v. Ringstaff*, 69 Ala. 140. See also, *Moody v. A. G. S. Ry.*, 124 Ala. 195, 26 South. 952; *Webb v. Elyton Land Co.*, 105 Ala. 471, 18 South. 178.

In addition to the above principle, which admits of proof which may make the description of this land clear,

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the language of the deed itself is persuasive to show that the construction given to it as set out in the amendment is correct, to-wit, the deed, as alleged, states that the land conveyed contains 160 acres. To construe the S. 1-2 as meaning the S. 1-2 of the section would include a great deal more land than that, while if we construe it to mean the S. 1-2 of N. W. 1-4 it will make just 160 acres, if the undivided half interest in S. W. 1-4 of S. W. 1-4 of section 28 be considered as 20 acres. While it is true that it is not technically correct to say that a person who owns an undivided half interest in 40 acres owns 20 acres, yet that is really what his interest amounts to, and for the purpose of harmonizing all the parts of the deed it is proper to suppose that the draftsman so understood it.—*Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551; *Davis v. Hess*, (Mo. Sup.) 15 S. W. 324.

The general purpose of the amendment is the same as that of the original bill, and there is no such variance, either in the allegations or in the relief sought, as would constitute a departure.

There is no merit in the cause of demurrer that complainant had an adequate remedy at law. This court has recognized the equity of a mortgagee, or a vendor with a lien for purchase money, to restrain waste in similar cases.—*Moses v. Johnson*, 88 Ala. 517, 7 South. 146, 16 Am. St. Rep. 58; *Coker v. Whitlock*, 54 Ala. 180.

The statute of limitations of 10 years has no application to a bill for the enforcement of a vendor's lien.—*Phillips v. Adams*, 78 Ala. 225.

There is no merit in the cause of demurrer that there was a misjoinder of parties, as all subpurchasers of parts of the land are proper parties to a bill to enforce the vendor's lien on the entire tract.

As to the cause of demurrer that the owners of N. E. 1-4 of N. W. 1-4 of section 29 are not made parties, the original bill alleges that the land covered by the deed is owned and claimed by the First National Bank of Rome, Ga., R. T. Dorsey, and John H. Reynolds, and they are made parties to the bill. In the amendment to the third section of the original bill it alleges that Dorsey, Van-

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dyke, and Reynolds became purchasers at the foreclosure sale, and that Vandyke sold some interest in said lands to said First National Bank of Rome and B. I. Hughes, but made no deed to them, and that Vandyke still holds the legal title to some interest in the land. Said Vandyke and Hughes are also made parties defendant. So there is no merit in this assignment. Whatever part was not sold by Dorsey and Vandyke remained in them.

The assignment of error that "the court erred in its said decree overruling the demurrer of respondents and their motion to strike parts of said bill of complaint" is too general. The demurrers have been considered, and the motion to strike is addressed to the sound discretion of the court, and the refusal to allow it is not revisable error.—*Ashford v. Ashford*, 136 Ala. 633, 34 South 10, 96 Am. St. Rep. 82; *Davis v. L. & N. R. R. Co.*, 108 Ala. 660, 18 South. 687.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

Yarbrough, *et al.* v. Thornton.

Bill to Restrain Sale of Land Under Mortgage.

(Decided July 6th, 1906. 42 So. Rep. 402.)

1. *Equity; Vendor and Purchaser; Failure of Title; Equitable Relief.*—Equity is without power to grant relief on account of a defect in the title, where the land is sold and conveyed with express covenants of warranty, unless the vendor is insolvent; but if there is a fraud or failure of title and the vendor is insolvent, equity will grant relief whether the purchaser is in possession or not.
2. *Mortgages; Foreclosure; Sale; Vacation.*—At the time of the sale of a large tract of land, it was agreed in writing if the vendor had no sufficient title to a part of the land, the price should be abated as to this land, which should be credited on the mort-

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gage given to secure the purchase price. The defendant, to whom the mortgage was assigned, had full knowledge of such agreement before the assignment of the mortgage to him. There was a failure of title as to 102 acres of the land. Held, complainant was entitled to vacate a sale of the land under the mortgage, when the sale was made at the time when there was nothing due on the mortgage, if the complainant had been credited with the value of the land to which the title had failed.

APPEAL from Elmore Chancery Court.

Heard before HON. W. W. WHITESIDE.

This was a bill filed by appellee against appellant Yarbrough and others, seeking an accounting, and to recoup value of a certain amount of land for which there was a failure of title, and for an injunction to restrain a sale under mortgage of certain other land, and to prevent interference by the mortgagee with the laborers and tenants of the mortgagor. The case made by the bill is that Mrs. Thornton purchased of one Bingham a certain tract of land situated in Elmore county, and particularly described in the conveyance which is attached to the original bill and made a part thereof, for the sum of \$19,000, part of which, to-wit, \$8,000, was paid by conveying to them certain property in the city of Montgomery, and the balance, to-wit, \$11,000, was the consideration for a mortgage executed by Mrs. Thornton to Bingham on the land purchased of him, which mortgage was also made an exhibit to the bill. It is further shown that about the time of said purchase, and as a part of the same transaction, said mortgage was transferred and assigned to Yarbrough, who has been since and is now the owner of the same; that at the time of said purchase it was known, understood, and agreed that said Bingham was not in possession of a certain part of said land which is particularly described in the bill, but that the same was in possession of certain divers named parties, who are in the adverse possession thereof, and that, in order to protect orator against any loss or damage she might sustain by any failure in the title or possession of said strip of land, Bingham executed to her a paper

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with another surety holding her harmless against any loss on account of said strip. It is averred that, when said mortgage was transferred and assigned to said Yarbrough, it was then and there understood and agreed that, if there should be any failure as to the title or possession of said 102 acres of land, the value thereof should be deducted from the debt secured by said mortgage, and that said Yarbrough at and before the assignment of said mortgage to him, has full knowledge of all the facts concerning said strip of land, and the agreement in reference to the deduction to be made therefrom. It is further averred that, although said strip of 102 acres of land is included in the deed made to her by said Bingham she has never been able to obtain possession of the same, and she has been deprived of the use and occupation, rents incomes, and profits therefrom, and that there has been an entire failure to procure her the title and possession of said 102 acres; that she has often demanded of said Bingham and Yarbrough that the title to the same be fixed, and that she be placed in possession of the said strip of land, but they have failed or refused to do so; that the value of said land, together with the use and occupation thereof in rents and profits, amount to a large sum, to wit, 2,000 or more, and this amount should be deducted from the said mortgage. It is further averred that according to the terms of said mortgage there were given by her 10 interest notes, each for the sum of \$330, payable on the 1st day of February and the 1st day of August of each year, and she was to pay the taxes, etc., on said property, and in the event she failed to pay the taxes the mortgagee could pay the same and they would become a part and parcel of the mortgage indebtedness. It is alleged that the interest notes have all been paid, except the one which was due August 1, 1904; that the taxes have all been paid by her, but that Yarbrough claims to have paid \$100 taxes for the year 1903, but that if he did so, it was under an arrangement made by her husband and Yarbrough, outside of and independent of the terms of said mortgage, and without her knowledge. It is further alleged that Yarbrough has declared the in-

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terest due August 1, 1904, to be forfeited, and the taxes on the place not paid, and has advertised all the lands to be sold under the terms of said mortgage for said interest, taxes, mortgage debt, and expenses. It is also alleged that there is a large amount of growing crops on said land, some of which are matured and need gathering, and that there are tenants on the place to gather the same, but that Yarbrough is interfering with them by sending his agents on the premises and giving notice to said laborers and tenants not to gather said crop and turn it over to her, and has greatly disorganized said labor and retarded the gathering of said crops, which are alleged to be worth \$10,000, to the great damage of orator in the sum of \$5,000. It is alleged that the property conveyed by the mortgage is easily worth \$20,000, and amply sufficient to pay all of the debt due Yarbrough, and that he is in no danger of loss on account of deterioration. Orator also offers to submit herself to the orders and decrees of the court, and to do and perform whatever may be required of her. The bill was afterwards amended by striking out certain parties defendant, and by adding that, at the time of the conveyance by Bingham to orator, Bingham had no title or right whatever to the 102 acres in the strip of land above described, and had no title whatever to another 50 acres of land which he attempted to convey to orator by his said deed, and which piece of land is particularly described in the bill; that he had no right to sell and convey the same to oratrix, and oratrix has never had possession of said two pieces of land, and that the value of the said two pieces of land was, relatively to the whole tract \$2,000, and the amount of purchase money paid and agreed to be paid therefor was \$2,000: that the said two pieces of land, at the date of said conveyance to oratrix, belonged to third persons; that the covenants of seisin, warranty, and of the right to sell and convey said two pieces of land to oratrix were broken at and before the defendant Yarbrough acquired said mortgage and mortgage debt from Bingham, and said Yarbrough took said assignment with actual or constructive notice of oratrix's right to have her damages

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arising from the said broken covenants on the part of said Bingham credited upon her mortgage debt, and she avers that her said damages exceed the sum of \$2,000, and that, giving her credit therefor, then there was nothing due on her said mortgage debt to said Yarbrough from the date of his purchase of the same to this time, and that, notwithstanding this, said Yarbrough proceeded to sell out oratrix's property under said mortgage and bid in the same, or had it done, and demanded possession of the premises, and that oratrix delivered the possession; and since the said pretended sale he has been in possession in fact as the mortgagee, accountable for rents and receiving the rents and profits of said premises, which oratrix avers have been worth the sum of \$2,000, for all of which said Yarbrough is accountable to oratrix as a credit upon her said mortgage debt.

After answering the original bill in detail, the defendant interposed certain grounds of demurrer thereto: "(1) Because there is no allegation in any paragraph of said bill showing that Bingham did not have a good title to the 102 acres of land alleged to have been in the possession of other persons. (2) Said bill shows on its face that complainant was aware, at the time she purchased said lands from Bingham, that said Bingham was not in possession of the 102 acres described in the third paragraph of said bill, and took the necessary steps to protect herself, requiring from the said Bingham a bond, with surety, against all loss or damage to her. (3) By accepting a bond of surety complainant waived any right she might have had against Bingham for an abatement of the purchase price by accepting said bond. (4) It appeared that none of the facts in reference to the adverse possession of the 102 acres of land mentioned in the third paragraph of said bill was concealed or kept secret from said complainant. (5) Complainant has a complete and adequate remedy at law." The defendant assigns the same grounds of demurrer, above assigned to the whole bill, separately and severally to the third and fourth paragraphs thereof; and defendant demurs to the sixth paragraph of said bill as follows: "It plainly appears that

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Yarbrough had a legal right, if he saw fit, to take possession of the lands conveyed by the mortgage together with any crops thereon. (2) The sixth and seventh paragraphs fail to show that the facts alleged in any way contributed to complainant's default in the payment of said mortgage or furnished any excuse therefor." To the eighth paragraph the defendant demurs on the following grounds: "(1) Because it is not sufficient as an offer to do equity. (2) Said paragraph fails to offer to pay the amount due on said mortgage, and fails to allege any inclination or ability to pay the same." To the ninth paragraph on the following grounds: "No facts are therein alleged. The same is a mere conclusion of the pleader." There was also motion to dismiss for want of equity, and motion to dissolve the injunction. The chancellor overruled the motion to dismiss; also overruled the demurrers. From this ruling this appeal is taken.

RUSHTON & COLEMAN, for appellant. Admitting that Yarbrough stepped into Bingham's shoes and is in the same position that Bingham would have been, there is still no equity in the bill in the absence of an averment of some special ground for equitable interposition, such as that the mortgagee was insolvent or a non-resident.—*Gafford v. Proskauer*, 59 Ala. 266. If it becomes necessary for the mortgagor to resort to equity on the grounds that he has a proper set off against the mortgagee or against the mortgage debt, he must show some other fact than the mere existence of such a demand.—*T. C. & D. R. R. Co. v. Rhodes*, 8 Ala. 206; *Cave v. Webb*, 22 Ala. 583; *Knight v. Drain*, 77 Ala. 373.

GÜNTER & GUNTER, and J. A. HOLMES, for appellee. It is a plain principle that the mortgagor would have no right at common law to insist that his claim against the mortgagee should be credited on the mortgagee's claim against him, unless he could show that the mortgagee was insolvent and that a proceeding against him at law would be unavailing to secure the payment of his debt, in which case, his right could be made available in a court of equi-

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ty.—*Tate v. Evans*, 54 Ala. 16; *Dade v. Irwin*, 2nd How. 383; *Elliott v. Sibley*, 101 Ala. 344; *Gafford v. Proskauer*, 59 Ala. 264; *Knight v. Drain*, 77 Ala. 373. In this case the complainant does not set up a counter claim or set off but his allegations are that he does not owe the respondent as much as is claimed by reason of a total or partial failure of the consideration of the contract which the respondent is seeking to enforce in another forum, and that failing in whole or in part, complainant's obligation to respondent is lessened to the same extent.—*Grisham v. Bodman*, 111 Ala. 194; *Pitts v. Powledge*, 56 Ala. 147. And this right is derived from the common law without regard to any statute. In this case as to the particular land for the value of which credit is sought, complainant's make a case of eviction, and hence, are not within the rule of the party in possession under a deed with covenants of warranty. The fact that the mortgagor had the right not to have the debt matured and his estate sold on account of the default not in fact existing is a substantial and plain equitable right.—Sec. 638, 1, Code 1896; *Watson v. Sutherland*, 5 Wall. 79; *Janney v. Buell*, 55 Ala. 409; 1 *Pomeroy*, Eq. Sec. 131, 132 and 297. There cannot be said to be any waiver of this natural equity to an abatement of the claim against the purchaser for default on the part of the vendor when part of the property has not been delivered and cannot be delivered, because of the making of the deed with full warranties and the giving of the notes and mortgages to secure the same.—*Hardigree v. Mitchum*, 51 Ala. 151; *Pitts v. Powledge*, *supra*; *Smith v. Pettus*, 1 S. & P. 107; *Allen v. Booker*, 2 Stew. 21; *Chicago et als. v. Fosdick*, 106 U. S. 47; *Doyle v. Hord*, 4 S. W. 241. The propositions of law relied upon are clearly stated in the authorities last above cited, and in the following cases:—*Sidney L. & C. Co. v. M. C. & F. L. Co.* 138 Ala. 185; *James v. R. R. Co.*, 6 Wall. 755. It is a gross fraud to sell under the power when nothing is due.

ANDERSON, J.—“When land is sold and conveyed with express covenants of warranty as to title, equity is

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without power to grant relief on account of a defect in title, unless the vendor is insolvent.—*Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; 2 Brick. Dig. 513, § 102; *Lett v. Brown*, 56 Ala. 550; *Strong v. Waddell*, 56 Ala. 471; *Hughes v. Hatchett*, 55 Ala. 539. If there be fraud or failure of title, and the vendor is insolvent, equity will interpose and grant what relief it can, whether the purchaser has a deed and is in possession or not.—*Younge v. Mabson*, 20 Ala. 137; *Walton v. Bonham*, 24 Ala. 513; *Keely v. Allen*, 34 Ala. 663." *Parker v. Parker*, 93 Ala. 80, 9 South. 426. In the case of *McLemore v. Mabson*, *supra*, the court held that the respondent's claim was not available without an averment and proof of the insolvency of the vendor. The statement of facts does not negative the possession of the defendant; but in the case of *Magee v. McMillan*, 30 Ala. 420, wherein the *McLemore Case*, *supra*, is discussed, it appears that insolvency of the vendor is essential to the vendee's relief when there has been no eviction, but is not a fact necessary to be averred when the vendee never went into the possession of the land or had been evicted before asking the relief, in case he had been let into possession. In the case of *Dykes v. Bottoms*, 101 Ala. 390, 13 South. 582, the complainant filed a bill to enforce a vendor's lien, and the respondent was permitted to abate the purchase money to the extent of the value of five acres of land conveyed to him, but which the vendor never owned and the possession of which was never acquired by the vendee, notwithstanding there was no averment or proof of the insolvency of the vendor. The case of *Gafford v. Proskauer*, 59 Ala. 264, holds that a mortgagor cannot be permitted to resort to a court of equity upon the sole ground that he has a proper set-off against the mortgage, but he must show some other fact that would entitle him to equitable relief.

The bill in the case at bar, as amended, seeks to vacate or cancel a sale made under the mortgage, upon the theory that it was fraudulently made, as the debt was not due, because there was no default as to the installment in that the value of the 102 acres should be applied in ex-

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tinguishment of said sum, and that it was agreed and understood between them that the value of the 102 acres should be applied as a credit on the mortgage debt. The chancellor did not err in overruling the motion to dismiss the bill for want of equity. The bill avers that, when the mortgage was transferred to Yarbrough, it was then and there understood and agreed, etc., and that the said Yarbrough, at and before the assignment of said mortgage, had full knowledge of the facts. The bill sufficiently avers an agreement between complainant and Bingham with the full knowledge of the assignee, Yarbrough. Nor does the bill show that this agreement, if made, was merged into the bond.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

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Bill by Judgment Creditor to Redeem From Sale Under Foreclosure.

(Decided April 20, 1906. 40 So. Rep. 984.)

1. *Judgment Creditor; Redemption from Foreclosure under Mortgage.*—Where a judgment creditor purchased at sale by Register (which sale was never confirmed) debtor's statutory right to redeem from foreclosure under mortgage, the purchase did not operate as a satisfaction of the decree, and did not destroy the judgment creditor's right to redeem.
2. *Execution; Sale; Deed to Purchaser.*—Section 2917, Code of 1896, relating to the execution of deeds to purchasers at judicial sales, applies only to sales made by the sheriff.

APPEAL from Lowndes Chancery Court.

Heard before Hon. W. L. Parks.

The bill in this case was filed by the appellee, the Deposit Bank of Frankfort, a corporation of the state of

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Kentucky, against the appellant, W. P. McGaugh. On the 18th of August, 1898, the complainant, which will be referred to as the "Bank," obtained a judgment in the circuit court of Lowndes county for \$1,068.21 against A. E. Caffee, besides costs of suit. After said judgment was obtained the bank filed its bill in the chancery court of Lowndes for the purpose of having declared fraudulent and void certain conveyances by A. E. Caffee to his wife, Annie E. Caffee, of land lying in Lowndes county, containing 1,536 acres, and a certain described tract of land lying and being in Perry county, Ala., referred to as the "Graham Place." This case, having been decided adversely to the bank in said chancery court, was appealed by it to the Supreme Court of the state, and on the 15th of December, 1902, a decree was rendered by the Supreme Court reversing the decree of the said chancery court, and decreeing that said conveyance by said Caffee to his wife was fraudulent and void against his creditors, and also decreeing that said lands be sold for the satisfaction of the bank's judgment against said A. E. Caffee, which was ascertained to be, at the time, the sum of \$1,462.16. It is averred that on, to wit, the 26th of April, 1895, said A. E. Caffee, together with his said wife, executed to J. L. Hinson a mortgage to secure the payment of \$475 due on November 1, 1905, with interest from date on the said lands in Lowndes county, which Caffee had conveyed to his wife, and which conveyance had been declared fraudulent and void as to his creditors; that said Hinson died, and his estate was removed into the chancery court of said county of Lowndes for settlement, and one J. D. Reese was appointed by said court receiver of his estate, and as such receiver, in pursuance of the power of sale in said mortgage, the said Reese proceeded to foreclose said mortgage by a sale of the property therein described on April 8, 1901, at which sale the defendant, W. P. McGaugh, became the purchaser at and for the sum \$512.18, and the said Reese, as such receiver, on April 29, 1901, executed and delivered to said McGaugh a deed conveying to him all the right, title, and interest of the said J. L. Hinson at the time of his death in and

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to said real estate, which deed was duly recorded in the Lowndes county probate office on the day of its execution, and the purchaser was put in possession of the property. It is further averred that on the 18th day of March, 1902, the bank, through its attorney, offered to redeem said land from said McGaugh in a manner as required by statute in such cases, and tendered him a deed to sign conveying to the bank all the right, title, and interest held and acquired by him at said sale in the foreclosure of said mortgage. It is not averred in the bill that the lands ordered by the supreme court to be sold in satisfaction of the decree rendered in the cause had ever been sold by the register of the court, as he was directed to do, nor is there anything averred touching the execution of said decree. The bank submits itself to the jurisdiction of the court and offers to pay whatever amount it may ascertain to be due said McGaugh for the purpose of redeeming said land from him.

The defendant filed a plea to said bill of complaint in which, after stating the facts above set out, it is averred "that after the said Hinson mortgage sale the only interest which remained in said A. E. Caffee and his wife, Annie E. Caffee, in said mortgaged land was the right under the statute to redeem said land within two years after said 8th day of April, 1901; that after the rendition of said decree in the supreme court of Alabama in the said bill of complaint mentioned, the register in chancery for said county, after due and proper advertising in accordance with law, offered for sale at public outcry for cash * * * on February 23, 1903, the interest of said Caffee and wife in the lands mentioned in the decree of the supreme court; * * * that after applying thereto the sum realized from the sale of the lands situated in Perry county there remains due to complainant on said decree rendered by the supreme court of Alabama the sum of \$1,488.78, including costs, * * * and complainant herein became the purchaser of the interest of said Caffee and wife in the lands situated in the county of Lowndes at and for

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and in order to pay said bid the complainant paid to the register the sum of \$111.22, the difference between its said bid of \$100 and the amount due on said decree, namely, \$11.22, and the register executed and delivered, and the complainant accepted the deed, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof. Wherefore the defendant says that, at the time of the alleged offer by the complainant to redeem said land from the defendant the said judgment and decree of the complainant upon which the complainant bases its right to redeem said lands from the defendant had been fully paid and satisfied by the purchase by complainant, at the sale aforesaid, of the interest of said Caffee and wife in the lands, and the complainant at the time of said offer to redeem had not, for the reason aforesaid, any right to redeem said land from the defendant, and has not, since said offer to redeem, acquired any such right." It is not averred in the plea that said sale was ever reported to and confirmed by the chancery court. After an affirmance by the supreme court and before the case was set down on its merits for trial in the court below, the respondent, appellant here, amended his plea by adding thereto: "That subsequent to the said purchase by complainant herein, and subsequent to the acceptance by complainant herein of the deed executed and delivered as aforesaid by said register, said register made report to said chancery court in and for the county of Lowndes in the said cause therein pending of the bank against A. E. Caffee, et al., of the said purchase by complainant therein under said decree of the interest of said Caffee and wife in and to the lands described in said decree of the supreme court of Alabama as hereinbefore set out, in the following words, to-wit: (Here follows the copy of the register's report.) That the said sale of the interest of the said A. E. Caffee and the purchase thereof by said bank has never been set aside by said chancery court for the county of Lowndes, and has not been otherwise set aside." The plea as amended does not show

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a confirmation of said register's report. There were demurrers to the plea for a want of sufficiency in the allegations thereof as a defense to the bill. The chancellor held the plea to be insufficient as a defense to the bill.

H. S. HOUGHTON, and W. P. MCGAUGH, for appellant.—The bank having bid at the sale an amount more than sufficient to satisfy the decree and paid the difference in cash and received the deed to the land purchased, could not thereafter use such judgment or decree for the purpose of redeeming under the statute as judgment creditors.—*McGaugh v. Deposit Bank of Frankfort*, 38 So. Rep. 181; *Preston v. McMillan*, 58 Ala. 94.

Complainant's acquired whatever title was vested in and conferrable by the Caffees' in and to the land for which complainant's bid by virtue of its bid at the register's sale and the acceptance of the register's deed in pursuance of the bid; and a confirmation of such sale was not necessary to convey such title nor to complete such sale.—*Jones et als. v. Burden*, 20 Ala. 882; *Adderholt v. Henry*, 82 Ala. 541; *Witter v. Dudley*, 42 Ala. 616; *Jones on Mortgages* (2nd Ed.) §§ 1637 and 1653.

Judicial sales cannot be repudiated by the purchaser except for fraud, accident, mistake, imposition or surprise, and the confirmation relates back to the date of the sale.—*Haralson v. George*, 56 Ala. 295; *Brown v. Isbell*, 11 Ala. 109; *Thomas v. Caldwell*, 136 Ala. 518; 17 A. & E. Ency. of Law, p. 992.

POWELL & HAMILTON, for appellee.—There is nothing in the plea from which an inference can be drawn that the sale of the land by the register was ever approved by the court and the sale cannot be valid until reported to and approved by the court making it.—*McGaugh v. Deposit Bank of Frankfort*, 141 Ala. 434; *Hutton v. Williams*, 35 Ala. 503; *Ex parte Branch*, 63 Ala. 386; *Cruikshank v. Luttrell*, 67 Ala. 318; *McEach-*

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in v. Warren, 92 Ala. 554. It, therefore, follows that appellee's judgment against Caffee was never satisfied, and that appellee as a judgment creditor had the right to redeem.—§ 3510, code 1896; *Wallace v. Hall*, 19 Ala. 317; *Bland v. Bowie*, 53 Ala. 159. There is nothing in the plea or contention that the sale made by the register was an absolute sale and irrevocable.

There is nothing in the plea to show that appellee's judgment against Caffee was ever marked satisfied or of record, or that Caffee ever insisted on its being so marked, and he was the only one who could do so.—*Mooney, et als. v. Parker*, 18 Ala. 708; *Poe v. Dorroah*, 20 Ala. 291; *McGhee, et als. v. Gwin*, 25 Ala. 186.

DENSON, J.—This is the second appeal in this case. The appeal now, as was the former one, is from an interlocutory decree adjudging the plea interposed by the defendant insufficient. The facts of the case as made by the bill and the plea are set out in the report of the case in 141 Ala. 434, 38 South. 181. The reporter will take the facts as there set out.

After the decree of the chancellor was affirmed the defendant amended his plea by averring that the register, on the 20th of July, 1903, reported the sale of the lands made under the decree of the chancery court. This amendment does not vary the facts of the case in any material particular from what they were as presented by the record on the former appeal, there being no averment in the plea that the register's report of the sale was ever confirmed by the court. So the question now before us for determination is the same as it was on the former appeal, and the answer to it must be the same, unless the court recedes from the decision then made.

The insistence of the appellant is that the appellee, having bid at the sale made by the register under the decree of the supreme court an amount more than sufficient to satisfy that decree, into which the judgment of the circuit court was merged, and having paid the difference in cash and received a deed to the land purchased from the register, could not thereafter use the

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judgment or decree for the purpose of redeeming under the statute allowing judgment creditors the privilege of redemption. This insistence proceeds upon the theory that the appellee's purchase operates an irrevocable satisfaction of the judgment and decree. This is undoubtedly the rule applicable to purchasers at execution sales, and was so recognized by us in the opinion handed down when the case was here before. But we held that the rule did not apply to this case for the reason that the sale at which the appellee purchased—the register's sale—was a judicial sale, to perfect which required a report to be made to the court and a confirmation of that report by the court, and without which the judgment against Caffee was not satisfied.—*McGrough v. Deposit Bank of Frankfort*, 141 Ala. 434, 38 South. 181.

It is now insisted that in reaching the conclusion the court omitted consideration of the case of *Jones v. Burden*, 20 Ala. 382. The case was not considered by the court, and it seems to have been overlooked by counsel also. In that case William Jones, as executor of Cheesborough, filed his bill in the chancery court to foreclose a mortgage executed by John Moyrant and wife on certain real estate. A decree of foreclosure was rendered by which the register was directed to sell the land in the same manner that sheriffs are required by law to sell real estate. At the sale Jones (the executor) and one Blair became the purchasers. The register executed to them a deed and they took possession of the land; but the sale was never confirmed, nor did the register ever report the sale. The amount bid at the sale was credited on the mortgage debt and a balance remained unpaid. Burden, who was a judgment creditor of John Moyrant, made the proper tender to Jones & Blair and filed his bill to redeem. The right to redeem was resisted on the ground that the sale was not perfect and complete, because it had never been confirmed by the chancellor. The court, speaking through Chief Justice Dargan, said: "In England a bidder cannot be considered as the purchaser until the sale has been confirmed

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by the chancellor; for until then the property is not at his risk, and if it be destroyed in the interim between the bidding and the confirmation he cannot be compelled to take it. But a practice has grown up in this state different from the practice in England. There the bid is reported by the master to the court of chancery, but the purchase money is not paid, nor any conveyance executed to the purchaser, until the report of the master is confirmed; but here the purchase money is paid to the register at the time of the bidding, and he, unless directed by the order of sale to the contrary, then executes and delivers to the purchaser a deed for the premises. This was the course pursued in the case before us, and the purchasers obtained possession of the land, and have occupied it ever since; and if we were to hold that it required a confirmation of the sale to render them purchasers, they have it in their power forever to prevent a judgment creditor of the mortgagor from redeeming, for they may decline to have the sale confirmed, and a judgment creditor has no power to compel them, and thus, from their own neglect in not procuring a confirmation of their purchase, they would reap a benefit. We think that, under the practice in this state we must hold the purchase complete from the time the bidder pays the purchase money, and receives a conveyance from the register. From that period the property is at his risk, and he could not repudiate the purchase for any thing afterwards intervening."

It would seem from the foregoing extract that the case conflicts with the former opinion in this case. But Chief Justice Dargan said in explanation of the foregoing: "It is not, however, to be inferred that we intend to hold that the bidder, by paying the amount bid and receiving a conveyance, obtains an indefeasible title without confirmation; for the practice is well settled, that the sale may be set aside before confirmation, for improprieties or irregularities in the sale. All that we intend to say is, that when the decree authorizes the register to receive the amount bid, and make a conveyance, the bidder must be considered as the purchaser

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from the time he receives a deed." It will be noted, too, that the court in that case laid stress on the fact that the purchasers were in possession of the land. In the case of *Witter v. Dudley*, referring to the case of *Jones v. Burden*, through Byrd, J., the court said: "In the case of *Jones v. Burden*, Dargan, C. J., in delivering the opinion of the court, says: 'All that we intend to say is that when the decree authorizes the register to receive the amount bid and make a conveyance, the bidder must be considered as the purchaser from the time he receives a deed.' In this we concur; but to some of the expressions in that opinion, prior and subsequent to the above extract, we do not assent, but consider it as explanatory of, and as limiting, those expressions." *Witter v. Dudley*, 42 Ala. 616. So it would seem that the case of *Jones v. Burden*, has been in some respects considered of doubtful authority.

However this may be, the sale at which the appellee in this case purchased was not a sale under execution on a decree; but the sale was made under a decree which condemned the specific property that was sold, to be sold by the register to obtain money with which to satisfy appellee's claim or judgment. It was essentially a judicial sale in which the court in legal effect was the seller. Such a sale is unlike a sheriff's execution, which is a ministerial, and not a judicial act, and in making which the law regards the officer, and not the court as the vendor. The fact that the decree directed that the register, in advertising and selling the lands, should proceed in the manner prescribed by law for sale of lands levied on under execution, cannot be construed as changing the nature of the sale. In other words, it cannot be construed as making the register or the complainant the vendor. This only requires and authorizes the register to advertise the land in the manner and for the length of time that is required by the statute applicable to execution sales and to sell at public auction at the courthouse. There is no other significance to be attached to it. And since the adoption of the code of 1896, it may be doubtful as to the authority

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of the register at such a sale in the absence of express authority, given by the decretal order of sale, to make a deed to the purchaser before confirmation.

Section 3208 of the code of 1876, which provides that, "when real estate, or any interest therein, has been sold by any sheriff, register in chancery, or commissioner appointed by any decree of the chancery or probate court to make sale of real estate or any interest therein, such sheriff, register or commissioner, upon compliance by the purchaser with the terms of sale * * * must execute a deed to the purchaser," etc., was amended by the adoption of the code of 1896, and the section as it stands in that code only applies to sales made by the sheriff.—§ 2917 (3208) code 1886. Section 2917 was carried into the code of 1896 as it stood in the code of 1886.—Code 1896, § 1914 (2917) (3208).

While, under the facts of the case at bar, the appellee might be considered a purchaser in the sense that the register could report him as such in his report of the sale to the court, yet the sale being a judicial one and its completion necessarily depending upon confirmation of the sale by the court, before there is confirmation, it would seem to be an illogical conclusion to hold that the purchase by the appellee was a satisfaction of the decree in its favor.—*McEachin v. Warren*, 92 Ala. 554, 9 South. 197; *Phillips v. Benson*, 82 Ala. 500, 2 South. 93; *McGough v. Deposit Bank*, 141 Ala. 434, 38 South. 181. Confirmation being a necessary step in the completion of the sale and not being averred in the plea, we again conclude that the decree of the chancellor holding the plea insufficient is correct; and adhering to the conclusion reached on the former appeal, a decree will be here rendered affirming the decree of the chancery court.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.
concur.

[Sicard v. Guyllou, et. al.]

Sicard v. Guyllou, et al.*Bill to Enjoin Ejectment and to Correct Description of Deeds.*

(Decided June 5, 1906. 41 So. Rep. 474.)

Equity; Bill; Multifariousness.—Complainant and G. purchased part of a plat of land from W., and complainant and G. went into possession of certain parts of the plat under their deeds, W. retaining the remainder; on account of inaccuracies in descriptions there resulted a confusion of boundaries on the face of the paper title, and G., claiming her deed conveyed the land occupied by complainant, commenced a suit in ejectment to recover it; whereupon complainant filed his bill against G. and W. and wife, original grantors of both complainant and G., to enjoin the ejectment suit and to correct errors in description in both deeds. Held, bill was properly filed as preventing a multiplicity of suits, and was not demurrable for multifariousness.

APPEAL from Jefferson Chancery Court.

Heard before HON. A. H. BENNERS.

Appellant filed his bill against Catharine Guyllou, A. G. Wheeler, and M. F. Wheeler, seeking to enjoin a suit in ejectment begun by Guyllou for the recovery of a certain lot of land and to correct the description in his deed. Demurrers were interposed raising the question of multifariousness and motion was made to dismiss the bill on the same grounds. From a decree sustaining the motion and demurrers this appeal is prosecuted. The facts sufficiently appear in the opinion.

ARTHUR L. BROWN, for appellant.—Complainant having acquired from Wheeler the right to the land in controversy took Wheeler's place and is entitled to have the deed from Wheeler to Guyllou corrected so far as it affects his property.—*Jones v. McNealy*, 139 Ala. 379; *Harris v. Ivey*, 114 Ala. 363. This being the case, appellant had the right to have the deed reformed and to re-

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strain the ejectments, and having acquired jurisdiction for one purpose, will hold it for all purposes, and do complete justice.

If the bill was multifarious as to the Wheelers and not as to Guylou, only the Wheelers could take advantage of it and they interposed no objection to it.—*Stone v. Knickerbocker*, 52 Ala. 589; *Boyd v. Hunter*, 44 Ala. 718; *Norwood v. M. R. R. Co.*, 72 Ala. 563; *Bragg v. Patterson*, 85 Ala. 233; *Bolling v. Vandiver*, 91 Ala. 575.

The court should entertain the bill to render certain that which is uncertain or to establish disputed boundaries, or to remove cloud from title, or to quiet title.—1 Pomeroy's Eq., § 246; 3 Ib., §§ 1384, 1386, 1387 and 1394.

The bill is not multifarious.—*Bank v. Walker*, 7 Ala. 926; *Andrews v. Jones*, 68 Ala. 117; *Wilkerson v. Bradley*, 54 Ala. 677; *McCartey v. McCartney*, 74 Ala. 556; *Lyons v. McCurdy*, 90 Ala. 447; *Florence Gas Co. v. Hamby*, 101 Ala. 14; *LeBeck v. Ft. Payne Bank*, 115 Ala. 447; *Larkin, et als. v. Riddle*, 21 Ala. 252; *Randall v. Boyd*, 73 Ala. 282.

BUSH & BUSH, for appellee.—The bill is multifarious.—*Jones v. Hardy*, 127 Ala. 221; 14 A. & E. Ency., P. & P. pp. 197, 199, 201.

WEAKLEY, C. J.—Multifariousness is incapable of exact definition, and the impossibility of laying down any general rule whereby it may be determined in all cases whether the objection is well taken has been often recognized. "The objection is frequently a matter of discretion, and so the circumstances under which it is allowed to prevail, so that every case must in a measure be governed by what is convenient and equitable under its own peculiar facts, subject to the recognized principles of equity jurisprudence; and it is always proper to exercise this discretion in such manner as to discourage future litigation about the same subject-matter and to prevent multiplicity of suits, and never so as to do plain violence to the maxim, that courts of equity delight to do justice and not by halves."—*Adams v. Jones*, 68 Ala. 117. No

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universal rule in regard to multifariousness can be or has been attempted to be established. "The substance of the rules on the subject appears to be that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court."—1 Daniell, Ch. Pl. & Pr. 334, note 2. All that can be done in each particular case, as it arises, is to consider whether it comes nearer to the decisions where the objection has been held fatal or to those where it has not been so held; and, if a complainant has an equitable right against each of the defendants in the subject matter of the suit, he may proceed against all of them in one suit.—*Boyd v. Hunter*, 44 Ala. 705.

The complainant in the present bill comes into the equity court as the owner and as being in possession of a certain lot, a portion of a plot of one acre, which originally belonged to his vendor, Wheeler. The defendant Guyllou, who filed the demurrer on which the decree we are reviewing was rendered, is alleged to have previously purchased from Wheeler another portion of the acre, and to have taken possession of that portion so purchased and that only; and the common vendor, Wheeler, is alleged to have retained and yet to own the remainder of the plot, the three parties together owning the whole, and each being in possession of his respective part. As a result of inaccuracies and misdescriptions in each of the deeds from Wheeler and wife to their two vendees, confusion of boundaries on the face of the paper titles has resulted; and Guyllou, claiming that her deed from Wheeler, properly construed, conveyed the land claimed by complainant, has instituted an action of ejectment against complainant to recover the lot of which he is in possession. The complainant files this bill against Guyllou and against Wheeler and wife, the common grantors, seeking to correct the errors and misdescriptions in both deeds, to enjoin the ejectment suit, and for general relief. In support of the grounds of demurrer, which assert that the bill is multifarious, it is argued: (1) That there are no connection between the deeds made by Wheeler and wife to Guyllou and the deed subsequently

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made to the complainant by Wheeler and wife; and (2) that there is no connection between the deed made by Wheeler and wife to the complainant and the ejectment suit brought against complainant by Guyllou. In a general way, it may be said that the bill is one to quiet the title and possession of complainant to the lot purchased from Wheeler. As one step in the process it is desirable and important to him to secure a correction of Wheeler's deed, under which he claims, so as to make it speak the real purpose of the parties and to correctly and accurately describe the lot purchased. When this correction is accomplished, it will show him to be a purchaser of the lot he claims, and will place him in a position where he is entitled to secure a correction also of Wheeler's deed to Guyllou, so as to make that deed describe the lot purchased and to exclude from it complainant's lot or any part of it. When it appears that complainant acquired from Wheeler the land of which he is in possession, his right to secure a correction of Wheeler's deed to Guyllou, in so far as it effects complainant's property, is apparent.—*Jones v. McNealy*, 139 Ala. 379, 35 South. 1022; *Harris v. Ivey*, 114 Ala. 376, 21 South. 422.

Proceeding, therefore, to enforce against Guyllou the right to have a correction of the latter's deed, he may, as incidental thereto, and to secure complete relief, proceed further and ask that the ejectment suit be restrained. All the equities asserted by the bill are therefore connected together, and all converge to the end and purpose of quieting complainant's title and possession, and, furthermore, to the settling of the boundaries between the three persons whose separate holdings make up the acre tract. No doubt the complainant might have maintained a bill against Wheeler and wife alone to correct their deed to him; but under the facts alleged, and in view of the situation of the parties and their relation to each other, we hold he might go further, for the purpose of preventing a multiplicity of suits, and also seek a correction of Wheeler's deed to Guyllou, with a consequent injunction of the latter's ejectment suit. There is a unity of purpose in the bill, and all the equi-

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ties relate to the subject-matter of the suit or are incidental thereto. There was not a joining of distinct and disconnected matters in such sort as to constitute multifariousness.—*Jones v. McNealy*, 139 Ala. 379, 35 South. 1022, 101 Am. St. Rep. 38. No good purpose would be subserved by comparing this case with others, in which the objection of multifariousness has or has not been sustained, since each case must be determined upon its own facts, and no two will probably appear to be exactly alike. Doubtless the combination of facts and circumstances here found does not exist in any other adjudication.

Appellees' counsel make no argument in support of the other grounds of demurrer. We have examined them, however, and are of opinion that they are not well taken. The decree of the chancellor sustaining the demurrer is reversed. A decree is here rendered overruling the same, and the cause will be remanded for further proceedings.

Reversed, rendered, and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

Markham, et al. v. Wallace.

Bill to Enjoin Ejectment, and to Declare an Instrument an Equitable Mortgage.

(Decided May 19th, 1906. 41 So. Rep. 304.)

Mortgage; Equitable Liens; Sale Under Executions; Priorities.—An unmarried man executed to his creditor an instrument, in form a mortgage, unacknowledged and unattested, to secure a recited indebtedness; the instrument contained apt words of conveyance and was recorded. Held, such an instrument was an equitable mortgage enforceable in a court of equity against subsequent purchasers of the mortgagor, with notice of the equity.

APPEAL from Lawrence Chancery Court.
Heard before HON. W. H. SIMPSON.

[Markham, et. al. v. Wallace.]

W. K. Wallace filed this bill against Elizabeth Markham, et als., as the heirs of John Petit, deceased, to enjoin an ejectment suit and to declare an instrument an equitable mortgage. The facts sufficiently appear in the opinion of the court. There was decree for complainant and respondents appeal.

KIRK, CARMICHAEL & RATHER, for appellants.—Under the allegations of the bill the execution lien attached on Nov. 19, 1881.—§§ 3181 and 3210, code 1876. A purchaser at that sale acquired a title superior to that of complainant by his deed of date Dec. 7, 1881.—*Watson v. State*, 78 Ala. 363; *Keele v. Larkin*, 72 Ala. 493; *Dryer v. Graham*, 58 Ala. 623. This lien binds all property subject to levy and sale.—3 Mayfield, p. 617. A purchaser of the equity of redemption in mortgaged land at execution sale against the mortgagor acquires a title on which he may maintain ejectment against the mortgagor in possession and the latter cannot defeat the action by setting up an outstanding legal title in the mortgagee.—*Cotton v. Carlisle*, 85 Ala. 175; *Wilkerson v. May*, 69 Ala. 33.

The allegations of the bill of complaint and of the instrument show there was no consideration for the contract. And there was, therefore, no mortgage nor a contract for mortgage which equity could enforce as an equitable mortgage.—20 A. & E. Ency. of Law, p. 920; 63 Ala. 366; *Thompson v. Dill*, 30 Ala. 444; *Florence C. & I. Co. v. Field*, 104 Ala. 480; *Morningstar v. Querns*, 141 Ala.; *Holland v. Bonds*, 53 Ala. 88. The respondents being the owner of the equity of redemption were entitled to have all the property over and above the amount required to pay the mortgage debt returned to them.—*Lovelace v. Webb*, 62 Ala. 271; *Fourch v. Swain*, 80 Ala. 151; *Childress v. Monette*, 54 Ala. 373; *Kelly v. Longshore*, 78 Ala. 205.

The bill shows no cause for equitable interference.—*Lyttle v. Sandefur*, 93 Ala. 396; *Rea v. Longstreet*, 54 Ala. 294.

If the debt secured by the mortgage had not been paid by the life tenant then it was barred by prescription.—*McArthur v. Corry*, 32 Ala.

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W. W. CALLAHAN, for appellee.—The instrument was an equitable mortgage.—*Woodruff v. Adair*, 131 Ala. 531; *Newlin, et als. v. McAfee*, 64 Ala. 357; 3 Pomeroy Eq., § 1237 and note. The record of the instrument was sufficient to give notice.—*O'Neil v. Seixas*, 85 Ala. 80; *Truss v. Harrey*, 120 Ala. 640. The assignment was sufficient in equity.—*Wells v. Cody*, 112 Ala. 278; *O'Neil v. Seixas, supra*; *Lowrey v. Paterson*, 75 Ala. 109; *Griffin v. Carmack*, 36 Ala. 695; 57 Ala. 28; 59 Ala. 186.

The mortgage being an equitable one it is necessary to resort to equity to enforce it.—*Eufaula National Bank v. Pruitt*, 129 Ala. 470. The relation between the mortgagor and the mortgagee is not fiduciary where the mortgage does not convey the legal title nor give any control to the mortgagee of the estate.—*DeMartin v. Phelan*, 115 Cal. 538. The legal effect of the sale by Sims of his equity of redemption to Wallace was the equivalent of a formal foreclosure.—*Peagler v. Stabler*, 91 Ala. 311; *Stoutz v. Rous*, 84 Ala. 309; *King v. Churchman*, 89 Am. Dec. 372. Even if this mode of foreclosure would not be recognized equity would keep alive Wallace's mortgage.—*Fouche v. Swain*, 80 Ala. 151. At the date of the sale by Sims to Wallace of his equity of redemption the mortgage day had passed, so Petit got nothing at the sheriff's sale in March 1882, as only the equity of redemption was levied upon.—*Shaw v. Lindsey*, 60 Ala. 344; *Electric L. Co. v. Rust*, 23 So. Rep. 751; *Lindsey v. Cooper*, 94 Ala. 170. Although the debt was barred the mortgage was enforceable.—*Ware v. Curry*, 67 Ala. 274; *Chapman v. Lee*, 64 Ala. 483; *Hood v. Hammond*, 128 Ala. 569. There is no such thing as a statute of prescription, but there is a rule of prescription aside from the statute of limitation.—*Jefferson v. Pettus*, 132 Ala. 674.

Appellants are too late in asserting an equity of redemption.—*Woodruff v. Adair*, 131 Ala. 531; *Lovell v. Hutchinson*, 106 Ala. 417. Such delay waives irregularity, illegality, unfairness, oppression and fraud.—*Pate v. Henson*, 104 Ala. 603; *Cowan v. Sapp*, 74 Ala. 44; s. c. 81 Ala. 525; *Boling v. Gantt*, 93 Ala. 90. In the absence of a particular feature to mark the case seasonable

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action is fixed at two years.—*Ezzell v. Watson*, 83 Ala. 120; *Gorrey v. Clements*, 94 Ala. 344; *Mason v. Mortgage Co.*, 124 Ala. 347. After more than twenty years of uninterrupted possession by Wallace there is a presumption of sale and conveyance of the property or anything else necessary to give repose to the title.—*Dawson v. Hoyle*, 58 Ala. 44. The legal title passed by Sim's deed to Wallace and the owner of the equity of redemption acquired no rights except to redeem.—*Robinson v. Price*, 118 Ala. 297; *Childers v. Monette*, 54 Ala. 319.

Appellants cannot invoke the doctrine of subrogation and marshalling of securities. Petit got only Sim's interest.—§ 3207 subd. 3, code 1876; *Lovelace v. Webb*, 62 Ala. 279. Nor can they require Wallace to proceed against the homestead of Sims before going on the other land.—*Talladega v. Browne*, 128 Ala. 557; *Roy v. Adams*, 45 Ala. 168. Appellants rights are barred by laches, staleness of demand and the statute of limitations.—*Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Lansden v. Bone*, 90 Ala. 446; *Lowry v. Davis*, 8 So. Rep. 76; *Robinson v. Pierce*, 118 Ala. 273.

A remainderman, pending possession of the life tenant, can maintain an action to quiet title.—*Worthington v. Miller*, 134 Ala. 421.

There is no equity of redemption in a mortgagor of an equitable mortgage.—3 Pomeroy Eq. (2d Ed.) §§ 1219, 1188, 1187, 1179-80; *Childers v. Monette*, 54 Ala. 309. Petit acquired no rights under his judgment, execution, sale and deed. The levy created at most a mere lien and did not divest title out of Sims.—*Frye v. Bank of Mobile*, 16 Ala. 382. Having levied on the equity of redemption in reversion he acknowledged the validity of the mortgage and acquired nothing other than the thing levied on.—*Gassenheimer v. Moulton*, 80 Ala. 527. The cross bill might have been dismissed ex mero motu.—*Jackson v. Knox*, 119 Ala. 320.

HARALSON, J.—It appears that the bill was filed on February 19, 1902, by complainant, William K. Wallace, against Elizabeth M. Markham and others, defendants, the heirs at law of J. T. Petit, deceased.

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It is alleged, that on May 15, 1873, E. T. Simms was indebted to James H. McDonald in the sum of \$550.00, evidenced by his promissory note of that date, payable twelve months after date, and that on May 23, 1873, the said E. T. Simms, for the purpose of securing the payment of said note, executed to said McDonald, "a written instrument or mortgage on the lands" described in the bill, which was filed for record, on the 18th of June, 1875, and was duly recorded in the probate office, on the 13th of March, 1876. Said instrument, in form a mortgage, was not attested by a witness, nor acknowledged by said Simms.

It is further shown, that on the 3rd of March, 1881, said note and mortgage were unsatisfied, and that Thomas D. Simms was the owner and in possession of said note and mortgage, and on said date, said Thomas D. Simms delivered said note and mortgage, and transferred the same without recourse to complainant, for a consideration of about \$800.00.

It is further shown, that E. T. Simms was, at the time of the execution of said note and mortgage an unmarried man; and on April 4, 1896, he entered into a marriage contract with Mollie De Graffenried, whereby he settled by deed upon her, for the term of her natural life, the lands described; that said marriage contract was in writing, and provided, that the conveyance to said Mollie De Graffenried, was made subject to the mortgage of \$550.00 executed by said E. T. Simms to said McDonald on said lands described in section 10 of the bill; that upon the death of said Mollie, the lands were to revert to the said E. T. Simms, his heirs and assigns forever. This marriage contract and conveyance were duly acknowledged on the 20th of the same month.

It is further shown, that on the 7th of December, 1881, said E. T. Simms and his wife, Mollie, for and in consideration of \$1,600.00, paid to them by William K. Wallace (the complainant), sold and conveyed to him the lands described in their deed to him, consisting of 400 acres, (or one-half of the 800 acres) of the lands described in said instrument or mortgage by said E. T. Simms

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to said McDonald, and in section 2 of the bill, which said lands are the subject of litigation in this suit. This deed was filed for record, on the 5th of January, 1882, and was recorded on the 7th of that month.

It is alleged that the note and mortgage referred to in the bill, were owned by complainant, W. K. Wallace, on the 7th of December, 1881, the date of the deed from said E. T. Simms and wife to him; that said mortgage only conveyed an equitable interest in the lands to said McDonald, and the transfer to complainant did not contain any apt words of conveyance; that in order to foreclose said mortgage, it would have required a bill in equity, which would have entailed a great expense, annoyance and delay, and to prevent this, complainant agreed to satisfy the mortgage and pay Mrs. Mollie F. Simms, in cash, the difference between the mortgage debt, and sixteen hundred dollars, the expressed consideration of the deed,—to procure her signature thereto, and that Mrs. Simms was claiming rights in said property under said marriage contract between herself and said E. T. Simms. It was also shown, that the true value of the lands conveyed to complainant by said Simms and wife, did not exceed the amount due on the mortgage; that the satisfaction of the mortgage indebtedness was all the consideration moving between complainant and E. T. Simms, and that all that was paid by complainant to said Mrs. Simms, was paid to acquire her signature to the deed, and a release of her alleged interest in said lands by virtue of her marriage contract, and thus by such arrangement and transaction avoid the litigation that would have necessarily followed her refusal to sign said deed.

It is again averred in the bill, that on October 24, 1881, Pettit & Simpson, a partnership composed of J. T. Pettit and William Simpson, recovered a judgment in the circuit court of Lawrence county against E. T. Simms in the sum of \$1,092.30, and on November 19, 1881, execution was issued, and on March 17, 1882, the sheriff of the county, claiming to act by virtue of process issued on said judgment, executed to J. T. Pettit, as a purchaser at sheriff's sale, a deed to the lands in question.

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The defendants, on the 9th of December, 1901, commenced in the circuit court of Lawrence county, their action to recover the possession of the lands in controversy, and this bill was to enjoin that action.

The chancellor rendered a decree granting relief to complainant, and decreed that the injunction theretofore granted in the cause be made perpetual; that the deed of Simms and wife of December 7, 1881, was effectual to pass and did pass to complainant the estate and interest of the grantors therein, both legal and equitable, against the claim of title asserted by respondents in their answer and cross-bill, and their cross-bill was dismissed; that the sheriff's levy and sale of the lands involved in this suit, conferred no right or title in said respondents, paramount to that of the complainant, Wallace, and the deed executed by the sheriff on the 17th of March, 1882, to J. T. Pettit was a cloud on complainant's title, and as such was cancelled and annulled. It should be added, that defendants filed a cross-bill on the theory that their right to the lands was superior to that of complainant.

The controlling question in this case is, whether the complainant has an equitable lien, right or claim to the lands described in the bill, superior to the lien claimed by defendant, which a court of equity will enforce. Upon that question, resort must be had to the instrument executed by E. T. Simms to J. H. McDonald, of date the 23d of May, 1873, and the deed by said Simms, and his wife Mollie, of date, the 7th of December, 1881, read in the light of the circumstances surrounding the parties at the time they were made. What purports to be a mortgage of the 23rd of May, 1873, as has appeared, was not witnessed or acknowledged. It had operative words of conveyance, and purported to be given to secure a note for \$550.00 executed to McDonald by said Simms, on the 15th of May, 1873, eight days previous to said instrument, intended as a mortgage. As was said in *Newlin v. McAfee*, 64 Ala. 364, "The form of the agreement is not material: operative words of conveyance are not essential to the creation of a charge, or trust, which a court

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of equity will enforce as a mortgage. It is the intention of the parties to charge particular property, rights of property, or credits, with the payment of debts, which the court will regard. When that intention is deducible from their agreement, the court will give effect to it, and the equity created will prevail against all others than innocent purchasers for value."

"Every written contract which shows an intention to charge some particular property, therein described and identified, with a debt or other obligation, creates an equitable lien on such property."—19 Am. & Eng. Ency. Law (2d Ed.) 13.

"The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appear to give, or to charge, or to pledge the property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows. * * * The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security."—3 Pom. Eq. Ju. § 1237.

"A parol agreement by a debtor that certain personal property belonging to him should stand good for his indebtedness, not accompanied by a delivery or change of possession, does not convey the legal title, but creates an equitable lien merely," which may be enforced by resort to a court of equity.—*Jackson v. Rutherford*, 73 Ala. 156; *Bush v. Garner*, 73 Ala. 166.

Upon the foregoing principles, it would seem there is no difficulty in declaring that the instrument of Simms to McDonald, of the 23d of May, 1873, created an equitable lien on the lands therein described in favor of said McDonald, which, under the facts stated, in the bill, accrued to the complainant, such as a court of equity will enforce, and of which, the defendants having notice, is superior to their claim arising from the purchase of their ancestor J. T. Pettit, under his execution against E. T. Simms, on the 17th day of March, 1882. Pettit purchas-

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ed with notice of complainant's superior lien, derived and maintained under transfers and conveyances from said McDonald. If complainant's equitable lien was superior to defendants', there was no room for their cross-bill, which was properly dismissed by the court below.

We discover no error in the decree of the chancery court and it is affirmed.

Affirmed.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur.

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Bill to Declare a Mortgage Fraudulent and Void.

(Decided July th, 1906. 41 So. Rep. 774.)

Amendment; Partnership; Suit Against Firm; Bill; Parties Defendant.—The bill was exhibited against a partnership composed of three named persons, non-residents, service was had on one of the named partners; complainant offered to amend by converting the suit into one against the partners individually, and to strike the names of those not served. Held, the amendment should have been allowed, even conceding that Section 40, Code 1896, has no application to suits in equity.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. Sayre.

This was a bill filed by H. Levystein as trustee against the firm of Gerson, Seligman & Co., seeking to have a mortgage declared fraudulent and void. The facts necessary to an understanding of the opinion sufficiently appear therein.

MARTIN & MARTIN, for appellants.—While the demand sought to be enforced is one against the partnership it is also a liability against each of the members composing the firm.—*Waldron v. Simmons*, 28 Ala. 629; *Cox v. Harris*, 48 Ala. 538; *Sims v. Jacobson*, 51 Ala. 186; *Rose v. Gunn*, 79 Ala. 411. The plaintiff may proceed against

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one or more of the parties thereto where he has a joint demand.—Sec. 670, Code 1896; *Teague v. Corbett*, 57 Ala. 229; *Moore v. Armstrong*, 9 Port. 697.

Having come into the state voluntarily service upon him subjected him to the jurisdiction of the court just as if he was a resident.—*Smith v. Gibson*, 83 Ala. 284; *E. T. V. & G. R. R. Co. v. Kennedy*, 83 Ala. 462; *Steen v. Swadley*, 126 Ala. 616; *Lee v. Baird*, 139 Ala. 526; *O'ber v. Gallagher*, 93 U. S. 199.

The complainant clearly had the right to amend his bill and proceed against Seligman alone.—Secs. 706, 704 and 3331; *Collins v. Stir*, 96 Ala. 338; *Rapier v. Gulf City Co.* 69 Ala. 476; *King v. Avery*, 37 Ala. 169; *Moore v. Alvis*, 54 Ala. 356; *Pitts v. Powledge*, 56 Ala. 147; *Sims v. Jacobson*, 51 Ala. 187; *McCaskey v. Pollock*, 82 Ala. 174; *Williams v. Bowdoin*, 68 Ala. 126; *Rosenburg v. Clafflin Co.* 95 Ala. 249. A defect curable by amendment is no more than an irregularity of which the defendant cannot take advantage.—*McLean v. Wright*, 137 Ala. 644.

STEINER, CRUM & WEIL, for appellee.—The attachment issued in this case was void.—Secs. 766, 762, 771, 772, Code 1896; *McKenzie v. Bentley*, 30 Ala. 139; *Dolins v. Lindsey*, 89 Ala. 217; *Ware v. Seasongood*, 92 Ala. 152. The situs of the debt sought to be reached by the garnishment was the state of Ohio where they were payable and no jurisdiction was acquired by the levy of these garnishments.—*L. & N. R. R. Co. v. Nash*, 118 Ala. 477; *L. & N. R. R. Co. v. Steiner, Lobman*, 128 Ala. 353. Sec. 40 of the Code of 1896, has no application to suits in equity against partnerships in the firm name.—*Opelika v. Daniel*, 59 Ala. 211. Admitting that service was had upon one of the members of appellee's firm, the other members are as much interested in the partnership property as he and are entitled to their day in court.—*Hall v. Lanning*, 91 U. S. 271; *Grover v. Radcliffe*, 137 U. S. 295; *Wood v. Watkinson*, 44 Am. Dec. 562 and note.

The decree pro confesso was properly set aside. Service made on him originally for the purpose of bringing

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the partnership into court could not bring him in originally.—*White v. Johnson*, 50 Am. St. Rep. 379 and note. No notice was given of the allowance of the amendment nor was notice directed to be given by the court on account of the non-residency of the firm.—*Alston v. Alston*, 34 Ala. 15; *Holly v. Bass*, 63 Ala. 387; *McClenney v. Ward*, 80 Ala. 343. To have allowed the amendment proposed and the substitution of Seligman individually would have made a change of cause of action and of parties.—*Williams et als. v. Hurley et als.*, 135 Ala. 319; *Steiner Bros. v. Stewart*, 134 Ala. 568; *Vinegar Bend L. Co. v. Chicago T. & T. Co.*, 131 Ala. 141.

TYSON, J.—The bill in this cause is exhibited against a partnership composed of three designated persons, non-residents of Alabama: service of summons being made upon Emil C. Seligman, one of the named partners. After a decree overruling a motion to quash the summons made by the party served, the complainant proposed to file an amendment converting the suit into one against the partners individually and to further strike out the names of the partners not served, so as to make it a suit against Emil C. Seligman alone. The court refused to allow the amendment, and the question is error vel non in this ruling.

We think, on principle and authority, the amendment should have been allowed. Conceding that section 40 of the Code of 1896, allowing suits against partnerships by their partnership name without mentioning the names of persons composing the firm, has no application to suits in equity (*City of Opelika v. Daniel*, 59 Ala. 211), this cause would be in a better situation for amendment than were the cases of *McCaskey v. Pollock*, 82 Ala. 174, 2 South. 674, and *Sims v. Jacobson*, 51 Ala. 186. In the latter case the action was brought in a firm name without any mention of individuals, and the plaintiff proposed to amend so as to evoke the action by individuals against individuals by inserting the names of the members of the plaintiff and defendant firms. The trial court refused to allow the amendment, and on appeal this court held the amendment allowable, saying: "The amend-

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ment proposed no change of parties and no change of the cause of action originally averred. A debt due the partnership of Sims, Harrison & Co. from the partnership of Jacobson & Co. must have been proved under the original, and must be proved under the amended, complaint. The partnership and their members were substantially before the court on the complaint as originally framed. A new party has not been introduced, which is unauthorized by our statute of amendments; but the designation of the respective parties, plaintiff and defendant, is only made more specific and certain. The amendment was proper, was the right of the plaintiff, and the court erred in refusing it." In the case of *McCaskey v. Pollock, supra*, a suit against the individuals of a firm was allowed by amendment to be converted into a suit against the partnership as such. The authority and reasoning of these two cases make it clear that the court erred in not allowing the proposed amendment in this case.

It is of no moment that the summons and the return of the sheriff thereon are not shown in the record, as it otherwise sufficiently appears that service was made on Emil C. Seligman, the member of the firm proposed by the amendment to be retained as the sole defendant. As the court dismissed the bill preliminarily for the want of parties defendant, we deem it unnecessary and improper to rule on other questions, which could arise only subsequently to the establishment of the suit in court.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Bill to Declare a Trust and to Terminate Same.

(Decided April 13, 1905. 40 So. Rep. 291.)

1. *Trusts; Resulting Trusts.*—A bill to declare a trust in lands conveyed by deed absolute, which avers that no consideration was paid, but that the conveyance was intended only to vest

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the legal title in the grantee as trustee for one of the grantors; that subsequent to the deed one of the grantors therein paid taxes on the land; that since grantor's death the grantee inquired if complainants would continue to pay taxes, and complainants furnished grantee money with which to pay taxes; that subsequent to the deed grantee advanced one of the grantors money at various times and looked to the property as security for the repayment of such sums, does not show a trust in lands resulting by implication of law.

2. *Mortgages; Equitable Mortgages; Absolute Conveyances.*—A bill to declare an express trust in lands conveyed by deed absolute which avers that no consideration was paid but deed was made for purpose of investing legal title in grantee, as trustee for complainant's mother, and that subsequently grantee advanced to one of the grantors various sums of money and looked to the property as security for repayment of the sums advanced, but which fails to aver in terms that any indebtedness existed between the grantor and grantee at the date of the execution of the deed, or any agreement for future advances were made to one of the grantors and the lands conveyed looked to as security for the payment of same, or that such grantor received the advances with any agreement that grantee could look to the land for payment or security does not allege sufficiently an agreement for a lien, or show a debt on which to rest the theory of an equitable mortgage; especially when the evidence shows that at the time of the execution of the deed, the legal title to the land was vested in one of the grantors as trustee, for the wife of another of the grantors.
3. *Same; Conveyance to Secure Debt; Pleading; Sufficiency.*—An allegation that the grantee, after the execution of a deed absolute, made advances to one of the grantors and looked to the land conveyed as security for advances so made, is not the equivalent of an averment that such deed was given to secure the debt. *
4. *Same; Pleadings; Proof.*—Proof of facts not alleged in the bill are immaterial, as proof without averment is unavailing to obtain relief in equity.
5. *Equity; Bill; Omitting Averment; Supplying by Prayer.*—Averments necessary to make out a case cannot be supplied by the prayer of a bill, where such averments are omitted in the bill proper.
6. *Trusts; Express Trusts in Lands; How Created; Necessity for Instruments in Writing.*—A bill to declare an express trust in

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lands, which avers that the lands were conveyed by deed absolute, but contains no allegation that any instrument in writing, was executed, signed by the party creating or declaring the trust, or by his agent or attorney lawfully authorized there-to in writing, as is required by Section 1041, Code 1896, is without equity; and the allegation that a letter was written by one of the grantors to the grantee, subsequent to the execution of the deed, declaring in effect, that such deed was executed for the purpose of securing any advances made by grantee to such grantor, is insufficient to bring the case within the terms of the statute; especially as it appears that such grantor had no title or interest in the land, but signed such deed as the husband of the other grantor, who was the real owner, for the purpose of joining therein with his wife.

7. *Same*; *Parol Evidence*.—An express trust in lands cannot be established by parol evidence, but only by written instrument, as is required by Section 1041, Code 1896.

APPEAL from Colbert Chancery Court.

Heard before Hon. W. H. Simpson.

Bill by Robert J. Funkhouser, et al., to declare a deed a trust, deed and to terminate the trust. The facts are sufficiently stated in the opinion of the court. From a decree retaining the temporary injunction and declining to dismiss the bill, this appeal is prosecuted.

KIRK, CARMICHAEL & RATHER, for appellant.—Under the allegations of the amended bill the trust, if it existed, rested in parol. It must be shown by parol evidence. For this reason the bill is without equity and the injunction should have been dissolved.—Sec. 1041, Code 1896; *Bracken v. Newman*, 27 So. Rep. 3; *Kelley v. Karsner*, 72 Ala. 106; *Patton v. Beecher*, 62 Ala. 579. The right to establish a resulting trust was barred before the bill was filed, the deed having been executed in 1883.—*Long v. King*, 117 Ala. 431; *James v. James*, 55 Ala. 525. The recital of a number of considerations, as between the parties is sufficient to prevent a resulting trust and confirm the title in the grantee.—*Jackson v. Cleveland*, 89 Ala. 279; *Houston v. Farriss*, 93 Ala. 587; *Bibb v. Hunter*, 79 Ala. 350; *Wiggins v. Winn*, 127 Ala. 621. None

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of the allegations in the bill bring this case within the exception named in Sec. 1041, Code 1896.—*Patton v. Beecher*, 62 Ala. 589 and authorities there cited.

R. C. BRICKELL & D. R. WHITE, for appellees.—The motion to dismiss the bill for want of equity was properly overruled.—*Elston v. Comer*, 108 Ala. 76; *Wells v. Morrow*, 38 Ala. 125; *Wiggins v. Winn*, 127 Ala. 621; *Williams v. Reggan*, 111 Ala. 621; *Robinson v. Farrelly*, 16 Ala. 472; *Glass v. Heironymus Bros.*, 125 Ala. 140. The statute of limitation has no application. In all cases of trust the trustee must bring knowledge of his adverse holdings home to the *cestui qui* trust in order for the statutes of limitation to operate.—*Beadle v. Scott*, 102 Ala. 532; *Bonner v. Young*, 68 Ala. 35; *McCarthy v. McCarthy*, 74 Ala. 546; *Holt v. Wilson*, 75 Ala. 58. An express trust need not be shown by the deed or memorandum creating the trust. It is sufficient if the mortgage be shown by writing or memorandum made subsequent to its execution and no particular form or precise words are required.—*Patton v. Beecher*, 62 Ala. 579; *Bibb v. Hunter*, 79 Ala. 351; *McCarthy v. McCarthy*, *supra*; *Wiggins v. Winn*, *supra*.

DOWDELL, J.—The amended bill, on which the case was tried and a final decree rendered, shows that in 1883 Robert M. Funkhouser, Sarah J. Funkhouser, his wife and Tilden S. Funkhouser, as trustee of Sarah J. Funkhouser, executed two deeds, copies of which are made exhibits to the bill, conveying the lands in question to S. Jacoby. These deeds each recite a consideration of \$1, "and other valuable consideration," and are on their face absolute conveyances with the usual covenants of warranty and seisin. The bill avers that no consideration in fact was paid, "but that said conveyance was intended only to vest the legal title to said property in said Jacoby as trustee for the benefit of said Sarah J. Funkhouser; that said Robert M. Funkhouser had long been upon terms of the most intimate friendship and confidence with the said Jacoby, and reposed in him the

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greatest trust and confidence; that subsequently for many years said Robert M. Funkhouser paid the taxes upon said property, and since the death of said Robert M. Funkhouser said Jacoby informed your orators that their father was accustomed to pay the taxes upon said property, and inquired if they would continue to do so, and your orators did furnish said Samuel Jacoby with money with which to pay said taxes; that subsequent to the execution of said deed said Jacoby advanced to said Robert M. Funkhouser various sums of money at different times, and the said Jacoby looked to said property held in trust as security for its payment; that subsequent to the death of said Robert M. Funkhouser, Sarah J. Funkhouser, and Samuel Jacoby, your orators, through L. P. Funkhouser, have often demanded of the defendant Jacoby settlement of the account due said Samuel Jacoby, their deceased testator, but have failed to procure such settlement; that said defendants Jacoby have claimed that there was an agreement between their deceased parents that Samuel Jacoby was to receive for his services in the event of a sale of said land 10 per cent. of the proceeds of such sale as his commissions therefor, but your orators are advised that the death of either of said parties terminated said agreement; that said Samuel Jacoby departed this life at his home in the city of New York, and state of New York, some time in the fall of 1899, as plaintiffs are informed and believe and from such information and belief state the fact to be, and that thereafter the defendants George W. and J. C. F. Jacoby qualified as executors of his last will, and as such have through their agent, the defendant Moody, advertised the said property for sale on the 7th day of April, 1902, being Monday next, and unless restrained by this court will proceed to sell the same, to the irreparable injury of complainants." The complainants are the children and heirs at law of Robert M. Funkhouser and Sarah J. Funkhouser, the former having died February 20, 1898, and the latter in May, 1900; and the respondents, except the respondent Moody, are the executors of the last will of Samuel

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Jacoby, deceased. The foregoing are substantially all of the averments of the amended bill. The prayer of the bill is for an injunction prohibiting the respondents from selling the land, and, further: "That upon the final hearing hereof an account be had between your orators and the defendants for the settlement of any amount due their deceased testator by said Robert M. Funkhouser or said Sarah J. Funkhouser, and that the complainants be allowed such time as to the court may seem proper to pay into court the amount found due upon such accounting, or, upon their failure to make such payment within the time allowed, that the property be sold, and the proceeds devoted, first, to the payment of the amount found due upon said accounting, and the balance paid over to your orators, and that said deeds of date May 28, 1883, be by the decree of this court declared to create said Jacoby a trustee for the benefit of your orators, and that said trust be terminated, and for such other and further relief as justice may require and to the court may seem meet and proper."

In none of the facts stated or averments made in the bill is there even a suggestion upon which to base the claim of a trust in the lands arising or resulting by implication of law.—*Patton v. Beecher*, 62 Ala.589. And with this statement we pass from that part of the argument of counsel in brief, feeling that it would serve no good end to discuss a question to our mind, in a sense, foreign to any case made by the bill. Nor are there any facts averred upon which to rest the theory of an equitable mortgage. The bill does not aver in terms, nor does it state any facts from which might be inferred, that there existed any indebtedness from the grantors to the grantee at the date of the execution of the deeds, or any agreement or understanding between the parties as to future advancements, which the deeds were made to secure. There is a statement in the bill that Samuel Jacoby, subsequent to the execution of the deeds, made advances to Robert W. Funkhouser, and that Jacoby looked to the lands for payment. This is not an aver-

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ment that the deeds were given to secure a debt, nor the equivalent of such an averment. The facts stated could be true, and still no lien on the land arise out of them. It is not alleged that Robert M. Funkhouser accepted or received the advances so made with any agreement or understanding that Jacoby could look to the land as a security for the same. Moreover, it was shown by the evidence on the hearing that at the time of the execution of the deeds the legal title to the lands was in Tilden S. Funkhouser as the trustee of Sarah J. Funkhouser. So we say the bill does not allege an agreement for a lien, nor does it show a debt. "A mortgage is essentially a security for a debt. When no debt exists, a mortgage is impossible."—*West and Wife v. Hendrix*, 28 Ala. 226; *Robinson v. Farrelly*, 16 Ala. 472; Mayfield's Dig. 195, § 10. "Every agreement for a lien, or a charge in rem, constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage."—*Bryant v. Stephens*, 58 Ala. 636. The bill in the case before us does not aver any agreement for a lien or charge on the land.

It is of no importance that it was shown by complainants' evidence on submission for final decree that an indebtedness from Robert M. Funkhouser to Samuel Jacoby, existed at the time of the execution of the deeds, since the bill contained no allegation to that effect. Proof without averment is as unavailing to obtain relief in equity as is averment without proof when there is a denial of the averment. There is a special prayer in the bill "that an account be had between orators and defendants for the settlement of any amount due their deceased testator by said Robert M. Funkhouser, or Sarah J. Funkhouser, and if the amount due is not paid in a reasonable time the land be sold to pay it;" but a prayer of the bill cannot take the place of allegation. The bill, as we understand it, is one to declare an express trust in the lands conveyed by the deeds of May 28, 1883, and to have a decree of the court declaring the trust terminated. A

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special prayer of the bill is "that said deeds be by the decree of this court declared to create said Jacoby a trustee for the benefit of your orators, and the said trust be terminated." Section 1041 of the Code 1896, which has been in all of the Codes from 1852, reads as follows: "No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereto in writing." There is no allegation in the present bill of any instrument in writing signed by the party creating or declaring the trust, or of his agent or attorney lawfully authorized thereto in writing. And, indeed, it is nowhere pretended that such was the case. It is insisted that the letter of Robert M. Funkhouser to Samuel Jacoby of June 30, 1888, five years after the execution of the deeds, in effect declaring that the lands were conveyed to him (Jacoby) by said Robt. M. Funkhouser for the purpose of securing any advance made and to be made by Jacoby to said Robert M., is sufficient to bring the case within the provisions of the statute. It is shown by complainants' own proof that Robert M. Funkhouser had no title or interest in, or control over, the lands at the time of the execution of the deeds, in which he doubtless joined as a grantor merely as a husband of Sarah J. Funkhouser, the real owner, for he had already, by deed executed in 1877, conveyed all of his right, title, and interest in the lands to Tilden S. Funkhouser as trustee for said Sarah J. Funkhouser. He no longer had the power of disposal over the property. It is not pretended that he (Robert M. Funkhouser), as the agent or attorney of the party having the power of disposal over the lands, was lawfully authorized in writing to create a trust in the lands, and especially for his own benefit, and therefore we are unable to see how the letter of June 30, 1888, can bring the case within the provisions of the statute. Fully recognizing the doctrine laid down in *Wiggs v. Winn*, 127 Ala. 627, 29 South. 96, and all that is there

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said, as to what writings, and when made, that may be sufficient to satisfy the provisions of the statute (section 1041, Code 1896) we are still unable from the facts in the case at bar to find any room for the application of the law stated in that case. The case of *Patton v. Beecher*, *supra*, is an authority directly opposed to any right of relief to the complainants on the evidence under the present bill. According to our view the complainants' case is nothing more nor less than an attempt to establish by parol evidence an express trust in lands, and this cannot be done in the face of the statute. Whatever of rights or equities the complainants may have in the lands, on the proof here made they are not available under the present bill.

Other questions than these we have considered are discussed in briefs of counsel, but, being unnecessary to a final determination of this case as presented, we forego entering into a discussion of them. It follows from our view of the case that the chancellor erred in the decree rendered, and the same must be reversed, and a decree will be here rendered dissolving the temporary injunction and dismissing complainants' bill; but without prejudice.

Reversed and rendered.

MCCLELLAN, C. J., and HARALSON and DENSON, JJ.,
concur.

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*Bill to Redeem from Sale to Enforce Vendor's Lien by
Purchaser after Sale.*

(Decided Feb. 17, 1906. 40 So. Rep. 201.)

1. *Vendor and Purchaser; Right to Redeem by Purchaser after Sale.*—The right to redeem after sale is a personal right, which cannot be transferred, except before sale; and the right of redemption as vendee, under Section 3505, Code 1896, ex-

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tends only to those who have purchased the equity of redemption before a sale from which redemption is sought.

2. *Pleadings; Demurrer; General Demurrer.*—Under Code 1896, Section 3303, none but special demurrers, as to matter of substance, are permitted, but in the case at bar, demurrers which are grounded upon the statement that the allegations of the bill show no sufficient rights in the complainant to exercise such right of redemption as claimed in the bill, and, that the allegations of the bill do no sufficiently show that the complainant is entitled to exercise such right of redemption in the manner and form as alleged, although general in form, are sufficient, and clearly point out that complainant occupies neither relation mentioned in the statute.

APPEAL from Randolph Chancery Court.

Heard before Hon. W. W. WHITESIDE.

This was a bill filed by appellee, seeking to redeem the mineral interests in certain lands therein described. The allegation of his right to redeem is based upon a purchase of the mineral interest in the land from the Moore & Hadley Hardware Company, who acquired title through a sheriff's sale under a judgment obtained against one Leo Levi. Said Levi, it is alleged, purchased the lands of one Lashley for a consideration of \$5,500, of which \$200 was paid in cash and promissory notes executed for the balance; said notes being made payable to Lashley and to one Aughay, Walker and Bell, that these parties to whom the notes were payable filed a bill in the Chancery court of Randolph county on the 14th day of July, 1902, to enforce a vendor's lien on the mineral interests in all the land for the satisfaction of the purchase-money notes; that on the 13th day of April, 1903, under an order of sale of this mineral interest, Sam Wallace became the purchaser for the sum of \$29; on October 13, 1903, the sale was confirmed, and the register of the court executed a deed to Sam Wallace for the mineral interests in all of said lands, and on the 20th of August, 1903, Sam Wallace and his wife sold and conveyed by proper deed the mineral interest in, under, and upon all of said lands situated in Randolph county; that on June 29, 1904, the said Levi and his wife con-

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veyed to complainant all the right, title, and interest which he had in and to all of the land situated both in Clay and Randolph counties—and concluding with a prayer to be let in to redeem. He also alleges a tender of the proper amount to redeem and a refusal on the part of the respondent. Demurrers were interposed to the bill as follows: “(6) The statements of said bill show no sufficient right in the complainant to exercise said right of redemption as claimed in said bill of complaint. (7) The statements contained in said bill of complaint do not sufficiently show that the complaint is entitled to exercise such right of redemption in the manner and form as alleged in the complaint.”

W. F. JOHNSON and BLACKWELL & AGEE, for appellant.—The demurrers are not general demurrers within the meaning of the Code.—*Brock v. S. & N. R. R. Co.*, 65 Ala. 79. The statute limits the right of redemption to the debtor, his vendee, junior mortgagee or assignee or his vendee, and does not give any right of redemption to the assignee of a person who himself had only a statutory right of redemption.—*Burk v. Brewer*, 133 Ala. 390; *Terry v. Allen*, 132 Ala. 658; *Powers v. Andrews*, 84 Ala. 289; *Adkins v. Bridgeford*, 84 Ala. 295; *C. R. E. & V. Assn. v. Parker*, 84 Ala. 298.

KNOX, ACKER & BLACKMON, for appellee.—Counsel cites *Sims v. Sampey*, 64 Ala. 230; *Flournoy v. Arthur*, 81 Ala. 494; *Bank v. Elliott*, 125 Ala. 653; *Prichard v. Sweeney*, 109 Ala. 651; *Harris v. Miller*, 71 Ala. 26.

SIMPSON, J.—This is a bill filed for the purpose of redeeming the mineral interests in certain lands lying in Randolph and Clay counties. The lands were originally sold by Lashley to Levi, and a vendor's lien for a considerable amount remained upon the lands in favor of Lashley. That portion of said interest in said lands lying in Randolph county was sold September 1, 1902, under an execution against Levi on a judgment rendered

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in favor of the Moore & Handley Hardware Company in March, 1902, and bought in by said Moore & Handley Hardware Company; and on July 13, 1904, the same was sold by said Moore & Handley Hardware Company to the complainant (the appellee). On July 14, 1902, a bill was filed against said Levi to enforce the lien for purchase money, and the mineral interests in both counties were sold thereunder in April, 1903, to appellant Samuel Wallace, and he in August, 1903, conveyed that part in Randolph county to the other appellant, Fred York, who is a nonresident of Alabama. In June, 1904, said Levi conveyed all of his right, title, and interest in the said lands in both counties to the complainant, and on July 13, 1904, the Moore & Handley Hardware Company, conveyed their interest to complainant. So it appears that the defendants hold under the sale to enforce the vendor's lien; and the complainant, who seeks to redeem, holds the interest in Randolph county under a deed made subsequent to the foreclosure sale by the Moore & Handley Hardware Company, who had previously bought the equity of redemption under their judgment, and he holds that part in Clay county by virtue of the deed of Levi, made after the lien had been foreclosed against him. It has been uniformly held by this court that the right of redemption, which is given by the statute after sale, is purely the creation of the statute, and that it is merely a personal privilege conferred upon those named in the statute, and is neither property nor the right of property, not assignable and not subject to levy and sale under execution.—*Burke v. Brewer*, 133 Ala. 289, 392, 32 South. 602, and cases cited; *Terry v. Allen Bros.*, 132 Ala. 657, 32 South. 664. While section 3505 of the Code of 1896 extends the right of redemption to the vendee of the debtor, that evidently refers to a person to whom the debtor may have sold the equity of redemption before the sale, under the decree or mortgage, etc., as the word "vendee" necessarily refers to a sale of land, and after the sale, by foreclosure or otherwise, under the statute, no inter-

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est in the land remains to be sold; and, if the statute had intended to confer the right to transfer or assign the personal right held by the debtor, other words would have been used. So, when the Moore & Handley Hardware Company conveyed to complainant, they had no interest in the land to convey after it had been sold under the foreclosure proceedings, but merely a personal right, which did not pass by the conveyance to complainant.

The chancellor held that the sixth and seventh grounds of demurrer to the bill were merely general demurrers, and therefore refused to consider them. Under the general principles of the law before the enactment of our statute, demurrers were either general or special; the former being deemed sufficient when the bill was defective in substance, and the latter being required where the objection was to the form of the bill. And they are said to be general "when no particular cause is assigned except the usual formulary * * * that there is no equity in the bill," and special "when the particular defects or objections are pointed out." Story's Eq. Pl. (10th Ed.) p. 416, § 455; 1 Beach's Modern Equity Practice, pp. 263, 269, § 231; 6 Ency. Pl. & Pr. p. 411. And Barton, in his Forms, gives the form of general demurrer in about the same terms as above set forth, and for a form of special demurrer gives as an example the allegation "that there is no privity between the said complainant and this defendant," etc. Barton's Suit in Equity, pp. 86, 87. Our statute allows no demurrer "but to matter of substance, which the party demurring specifies." Code 1896, § 3303. So the effect of our statute is to make all demurrers special, and, taking the authorities on the general subject and the wording of our own statute, it does not seem to be necessary to go into all the particulars and minutiae which go to make up the objection, but merely, in the language of the general authorities, to "point out the particular defects or objections," or, in the language of our statute, to "specify" them. Our own courts have frequently held that a demurrer which merely states that "there is no equity in the bill" is general.—*McGuire v. Van Pelt*, 55 Ala. 344;

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Beebe v. Morris, 56 Ala. 525. The same has been held with regard to other words which are merely the equivalent of that expression.—*M. & M. Ry. Co. v. Crenshaw*, 65 Ala. 566; *Williams v. Bowdin*, 68 Ala. 126. Where the demurrer was merely to certain words in the complaint (reciting them), it was held not a compliance with our statute, because, although it did point out the portion of the complaint demurred to, it did not state the objection to it; and the court says: "It should point out and specify the defect or defects on which the party demurring asks the judgment of the court."—*Burns v. Mayor, etc.*, 34 Ala. 485, 487. And in the case of *McGuire v. Van Pelt, supra*, BRICKELL, C. J., stated the trouble to be that "it does not point out in what respect the bill wants equity."

On the other hand, a demurrer to a petition for rehearing, because "the petitioner had not complied with the law governing such petitions, and that the court had no jurisdiction or power to grant the prayer," was sustained. *State, to Use, etc., v. Gardner*, 45 Ala. 46, 50. It has been held sufficient to state "that the bill is multifarious, that complainants have an adequate remedy at law," that certain parties should or should not have been made parties, etc.—*Beebe v. Morris*, 56 Ala. 525. Also "that the alleged accident, fraud, or mistake was not shown to have occurred without the fault of plaintiff," as it points out with reasonable certainty the defect on which the party demurring prays the judgment of the court.—*Brock v. S. & N. Ala. R. R.*, 65 Ala. 79, 82. This court has also declared that, if a bill contains no equity, it would not be error for the chancellor to dismiss it, even though there be no demurrer.—*Lesslie v. Richardson, et al.*, 60 Ala. 563-568. In a case in the Chancery Court of New Jersey, based on their statute, which requires "every demurrer * * * to state the particular grounds of the demurrer," the chancellor cites the English decisions on a rule similar to our statute to the effect that the object of the law was merely to meet those cases where the grounds of demurrer were obscure and could not be necessarily understood by the mere

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general allegation, and that, even under that rule, "where the court finds, on looking at the complainant's bill, that his right to relief is doubtful or uncertain, or, in the words of Sir George Jessel, that his equity is not obvious at first sight, there a simple statement of want of equity will, under the rule, constitute a sufficient specification of the ground of demurrer."—*Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466.

Without going to the extent of the English decisions as adopted by the New Jersey court, we hold that the sixth and seventh grounds of demurrer in this case sufficiently specify the matter of substance to which the demurrer was made. The bill is clearly filed to enforce the right of redemption, which is purely the creature of the statute, and the statute clearly states what classes of persons are authorized to redeem, so that the meaning of said demurrers is clearly that the complainant has not shown by the bill that the complainant occupies either of the relations mentioned in the statute. It would not have been any clearer or more specific if it had stated that the bill does not show that the complainant is either "the debtor, his vendee, junior mortgagee, or assignee of the equity of redemption from the purchaser or his vendee." Under this view of the case, the other grounds of demurrer were without merit.

The decree of the court is reversed, and the cause remanded.

HARALSON, DOWDELL, ANDERSON, and DENSON, JJ., concur.

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Miller, *et al.***

Bill to Annul Contract, and to Have Property Restored.

(Decided June 14th, 1906. 41 So. Rep. 678.)

1. *Corporations; Foreign Corporations; Non-compliance with Statute; Effect.*—One who has entered into a contract of sale with a foreign corporation, and has performed the contract

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by a delivery of the property sold to the corporation, cannot urge, as a ground for setting aside the sale, the failure of the corporation organized in another State to comply with Section 1316, Code 1896, and the Constitutional provision relating thereto.

2. *Same; Contracts before Incorporation; Construction.*—Appellees, owners of a saw mill outfit and timber contract, entered into an agreement with the company to sell said saw mill outfit and timber rights to the company in consideration of the organization of a corporation for the manufacture of lumber; stipulating further, also, that the corporation should be capitalized at \$10,000, one-fourth of the stock to be owned by appellees, and three-fourths to be owned by the Company. Held, the contract so entered into stipulated, not only the organization of a corporation, but that the company would contribute something of value to it in consideration of three-fourths of the stock which should be owned by the company.
3. *Same.*—Where a company agreed to organize a corporation to be capitalized at \$10,000, one-fourth of which was to be owned by the owner of a saw mill outfit and timber rights and three-fourths to be held by the company, and in compliance with the contract the owner of a saw mill outfit and timber rights conveyed to the corporation his property in consideration of one-fourth of the stock, and the company did nothing towards its part of the contract in the way of payment for three-fourths of the stock held by it, and the rights of no other stock holders intervening to be affected by the cancellation of the sale, the seller was entitled to maintain a bill against the company and the corporation to have his right in the saw mill outfit and timber restored to him.
4. *Sales; Purchasers from Buyer; Notice of Equity.*—Where property was sold to a company in consideration of the organization of a corporation to carry on the lumber business, the purchaser of the property so sold to the company, who had knowledge of the equities of the seller in the property, is liable to the seller.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

The bill in this case was filed by Charles G. Miller and C. T. Rogers, as complainants, against the A. J. Cranor Company, Limited, the Russell Lumber Company, Limited, and John Jackson, seeking to avoid a contract made between these parties and to have property rights

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in certain machinery and timber land restored to complainants. The facts made by the bill are that the complainants and A. J. Cranor Company, Limited, entered into a contract the provisions of which are as follows: That the complainants are the owners of a sawmill outfit consisting of a 35 horse power boiler and a 30 horse power engine and sawmill, with edger saw and other connections, situated on the land of the Mobile & Chattanooga Railroad Company, near Russell, in Mobile county, Ala., and that they have certain timber interests in lands and options on stumpage for pine timber to be cut. That the machinery was bought from Adams Machine Company by complainants, and that complainants were due on said machinery between \$500 and \$600, with retention of title in the machinery to the said machine company until the purchase price was so paid. The complainants sold and delivered all their right, title, and interest to all pine timber stumpage options and timber rights held by them, together with the machinery and appliances, to the A. J. Cranor Company, Limited, upon the consideration that the A. J. Cranor Company would pay off and discharge the amount due the Adams Machine Company for the unpaid balance on the machinery, and would form a stock company for the manufacture of lumber within 60 days from the date of the contract, capitalized at \$10,000, one-fourth (or \$2,500) of the said stock to be held and owned by Miller and Rogers, and three-fourths (or \$7,500) of capital stock to be held and owned by the A. J. Cranor Company. In the event of the failure on the part of the A. J. Cranor Company to fulfill this contract within the 60 days, the property rights and machinery should revert to and become the property of the complainants. The bill further alleges the delivery of the property by complainants to the A. J. Cranor Company; the formation of a stock company under the laws of the state of Louisiana, with an ostensible capital of \$10,000; that said stock company was organized under the name of the Russell Lumber Company; that said A. J. Cranor Company has failed to subscribe for the stock according to agreement, or, if they

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have subscribed, they have failed to pay for said stock, either in money, labor done, money borrowed, or property actually received by said company, as is required by the laws of Louisiana, but that this company has caused to be issued \$7,500 of the said stock of the Russell Lumber Company to the said A. J. Cranor Company without payment therefor in any amount; that said stock was issued in fraud of complainants and for the purpose of obtaining control and the right of disposition over property of complainants; that A. J. Cranor Company has failed and refused to pay to the Adams Machine Company the purchase money still due on the machinery, except a small part thereof, to-wit, about \$95, and that the Adams Machine Company are making demands upon complainants for the balance due on said machinery; that at the time of making the agreement said A. J. Cranor Company had no intention to pay any sum of money or any other consideration for the stock of said Russell Lumber Company, and the proposed organization of the said Russell Lumber Company was a fraudulent scheme to deprive complainants of their property as aforesaid; that all of the stockholders of the said Russell Lumber Company, except complainants, are officers of said company, and that neither the A. J. Cranor Company, nor the Russell Lumber Company, nor John Jackson have sufficient assets within the state of Alabama to satisfy any judgment at law which might be rendered against them or either of them; that said sawmill is not now being operated and no insurance is carried on the same; that said property is depreciating in value; that the Russell Lumber Company has begun dismantling it, and that there is great danger of it being destroyed or moved beyond the jurisdiction of the courts of this state and lost to orator; that John Jackson claims to have purchased the machinery and is dismantling it and removing it; and that the purchase was made by him with full knowledge of complainants' equity and rights in the premises. The bill further alleges that at the time of the making of the agreement above set out the A. J. Cranor Company was a foreign corporation and had not complied with the statutes of the state of Alabama with respect

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of foreign corporations doing business in this state. The same allegations were made with reference to the Russell Lumber Company. An injunction was issued as prayed. Demurrers and answers were filed to the bill, but they are not necessary here to be set out, as they sufficiently appear from the discussion of them in the opinion. The facts also sufficiently appear in the opinion.

ROACH & McMILLAN, for appellants. No brief came to the Reporter.

MITCHELL & TONSMIRE, for appellees. No brief came to the Reporter.

ANDERSON, J.—This bill was filed to cancel a contract for the sale of a mill outfit and certain timber rights, and after a delivery of the property by the complainants to the respondents, and seeks to have the contract declared void *ab initio*, because made in violation of section 1316 of the Code of 1896, or, if valid in its inception, that it be canceled upon the ground of fraud practiced upon complainants by the vendee, the Cranor Company. We do not think that a failure of the foreign corporation to comply with the constitutional provisions and section 1316 is available to these complainants, as the contract has been fully performed by them by a delivery of the property sold.—*Gamble v. Caldwell*, 98 Ala. 577, 12 South. 424; *Farrior v. New Eng. Mtg. Co.*, 88 Ala. 275, 7 South. 200; *Kindred v. New Eng. Mtg. Co.*, 116 Ala. 192, 23 South. 56. Since the complainants are not entitled to relief upon this theory of the bill, it is needless to consider the action of the chancellor upon the demurrers proceeding upon this feature of the case.

We think the contract contemplated, not only the organization of a corporation, but that the respondent the Cranor Company would contribute something of value to the concern; that is, do more than merely issue three-fourths of the stock to themselves, but that the same was to be paid for. Otherwise, we would have a case of one party furnishing all the capital and getting one-fourth of the stock, and the parties furnishing nothing getting

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three-fourths of the stock. The bill avers that the Cranor Company procured the complainants' property without a valuable consideration thereof, and that the said company at the time had no intention to pay anything of value for the stock of the corporation, the organization of which was a fraudulent scheme to get complainants' property, and therefore contained equity. "The general rule is that the relation of the promoter to the corporation and its members is one of trust, and he must act in all things fairly and openly."—*Yale v. Wilcox* (Conn.) 25 L. R. A. 90, and note. "Promoters who acquire property to be used by the corporation wholly at the cost of those who pay for their shares, and retain for themselves a majority of the stock, which cost them nothing, will be required to pay to the defrauded subscribers the damages caused by such action."—*Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498.

As a rule the remedy of a defrauded subscriber is against the defrauding promoter, and not the corporation; but in the case at bar the respondent the Cranor Company and the complainants constitute the corporation, which seems to have been formed by the Cranor Company as an attempted literal compliance with their contract, and there are no intervening rights of other stockholders to be affected by a cancellation of the sale. The evidence clearly shows that the Cranor Company did not intend at the time of the execution of the contract to put anything of value into the new corporation, and that it was a scheme to get control and management of complainants' property, and the chancellor properly granted the complainants relief.—*Dean v. Oliver*, 131 Ala. 634, 30 South. 865. The bill avers that Jackson had full knowledge of complainants' rights and equities when he bargained for the property, and the demurrers interposed by him were properly overruled.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

[Pensacola, A. & W. Ry. Co. v. Big Sandy Iron Co.]

**Pensacola, A. & W. Ry. Co. v. .
Big Sandy Iron Co.**

Bill for Injunction.

(Decided May 17th, 1906. 41 So. Rep. 418.)

Appeal and Error; Record; Organization of Trial Court.—Where the transcript fails to show the organization of the trial court, the appeal will be dismissed as no judgment is shown that will support an appeal.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

This is a bill filed by the Pensacola A. & W. Railway Co., of Ala., v. Big Sandy Iron Co., et al., to enjoin certain prosecution and threaten prosecution of complainant's agents and servants. The transcript fails to show the organization of the court trying the cause, and upon this fact the opinion is rested.

PITTS & PITTS, for appellant.—Counsel discussed points raised by the record and cite authorities thereon but do not discuss the point upon which the decision is rested.

AUGUSTUS BENNERS and W. P. McCROSSIN, for appellees. Counsel discussed points raised by the record and cite authorities but do not discuss the point on which the opinion is rested.

DENSON, J.—It cannot be gainsaid that, "since this court acts on the transcript alone, the latter must show all the facts essential to vest the court with jurisdiction to hear the cause." Therefore it must affirmatively appear in the transcript that there was a properly organized trial court by which a lawful judgment could be rendered.—*McPherson v. Wiggins*, (Ala.; April 28, 1906) 40 South. 961; 2 Ency. of Pl. & Pr. p. 265, (3), and authorities in note 2; 2 Cyc. p. 1033 (11), and au-

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thorities in notes 17 and 18. This record fails to show the organization of the trial court, and the appeal must be dismissed.

Appeal dismissed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

C. W. Zimmerman Mfg. Co., v. Wilson, *et al.*

*Bill to Enjoin Administrator from Paying to Heirs
Proceeds of a Sale, and to Require Heirs to Ac-
count for Breach of Contract of Life Tenant.*

(Decided April 3, 1906. 40 So. Rep. 515.)

1. *Life Estates; Acts of Life Tenant; Injury to Remainder; Waste.*
—The life tenant cannot commit waste or authorize its commission, nor can she, by conveyance, impair the remainder.
2. *Sales; Remedy of Buyer from Life Tenant; Lien on Money Paid.*
—Neither the purchaser from the life tenant, nor his assignee, has any lien upon the money paid for timber purchased of the life tenant, either in her hands or the hands of the children and heirs, that would authorize him to maintain a bill against the heirs to obtain a personal decree against them for a breach of covenant by the life tenant.
3. *Descent and Distribution; Debts of Intestate; Liability of Heirs.*
—A claim of damages for breach of covenant of life tenant will not lie against the heirs, but must be presented in due course of administration, and remedy sought against the property of decedent.
4. *Same; Actions; Equity.*—A court of chancery cannot by a species of equitable attachment, or garnishment, seize and hold money coming to the heirs from the father's estate, where the complainant had no claim assertable in equity against the heirs for breach of contract to defend title made by the mother, the life tenant, in the sale of timber, to satisfy a decree that complainant could not obtain.
5. *Estoppel; Covenant of Ancestor; Liability of Heirs.*—The heirs claiming title independent of the life tenant, cannot be estopped by the mere force of the covenant of their ancestor.

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APPEAL from Clarke Chancery Court.

Heard before Hon. THOMAS H. SMITH.

This bill was filed by the C. W. Zimmerman Mfg. Co. v. the heirs of Alston Wilson, seeking to restrain the administrator from paying out to the heirs money obtained from the sale of the homestead of the widow and to require the said heirs to account for the breach of a contract of sale entered into by the widow of Alston Wilson. The facts may be briefly stated as follows: Alston Wilson died in Clarke county on March 26, 1887, leaving certain real estate. His estate was administered on by the widow, and out of the real estate left by him dower and homestead was set apart to her in the probate court in 1888. On Sept. 18, 1887, she sold to the Park-Smith Lbr. Co., all yellow pine timber on the land which had been assigned and set apart to her as homestead and dower and received therefor \$549.00. She died Nov. 6, 1899, and no administration has been had on her estate. No timber has been cut from the land. On Dec. 22, 1900, William H. Wilson, one of the defendants, became administrator *de bonis non* of the estate of Alston Wilson, and as such sold said land for distribution, including the homestead and dower land under the order of the probate court.

LACKLAND & WILSON, for appellant. In the conveyance of the timber from the mother of the appellees to the appellant there is a covenant to defend title against all persons. Such covenant runs with the land.—*Claunch v. Allen*, 12 Ala. 159. Covenants which run with the land pass to the grantee under any conveyance which is sufficient to transfer title to the land from the vendor to him.—8 A. & E. Ency. of Law (2nd Ed.) pp. 142-145; 40 Ala. 561. The heir is bound on a covenant of the ancestor which runs with the land to the extent of assets received for lands descended from such ancestor.—8 A. & E. Ency. of Law (2nd Ed.) 161 et seq.; *Robbins v. Webb*, 68 Ala. 393. Some of the appellees being insolvent, appellant has no adequate remedy at law and an equity court will give him such relief as it

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can.—*Walton v. Bonham*, 24 Ala. 513; *Parker v. Parker*, 93 Ala. 80. The equity of the bill rests upon another ground. A person will not be permitted to convert property into money by a sale and if, for any reason, the conveyance should fail to pass title, hold on to the purchase money and take back the property.—*Nelson v. Shelby*, 96 Ala. 515; *Goodman v. Winter*, 64 Ala. 410.

TAYLOR & ELMORE, and WILLIAM D. DUNN, for appellees.—Uncut timber or standing trees are a part of the freehold and pass with it.—*Clifton Iron Co. v. Jemison*, 108 Ala. 581; *Heflin v. Bingham*, 56 Ala. 566; *Riddle v. Brown*, 20 Ala. 412; *Mitchell v. Billingsley*, 17 Ala. 393; The right to cut and remove timber in a certain time is a lease.—13 A. & E. Ency of Law, 1031. The lease of Mrs. Wilson to the Park-Smith Lbr. Co., terminated at her death and the respondents had the right to the immediate possession of the land.—10 A. & E. Ency of Law, 152-153. The widow had no right to impair the value of the realty or to commit waste.—*Alexander v. Fisher*, 7 Ala. 514; 10 A. & E. Ency of Law, 151. The dower and homestead interest of Mrs. Wilson were only for her life and her conveyance could not impair or affect the remainder in any manner.—*Smith v. Cooper*, 59 Ala. 494; *Price v. Price*, 23 Ala. 609; *Jones v. Harkins*, 18 Ala. 489; *Lyde v. Taylor*, 17 Ala. 270.

WEAKLEY, C. J.—The bill as amended asserts against the heirs at law of Susanna Wilson, deceased, a claim for a breach of a contract to defend title, made by her in the sale of the pine timber growing upon the lands which had been set apart to her for dower and homestead, as the widow of her deceased husband, Alston Wilson. The claim is rested principally upon the allegation that some of her heirs, all being made parties defendant to the bill, are insolvent, and that as heirs and distributees of their mother they had received and divided among themselves the money paid for the timber, as well as all her other property. In order to reach, for the satisfaction of the decree sought by complainant,

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the proceeds of the sale of the dower and homestead lands, made after the death of the widow, at the instance of the administrator *de bonis non* of the estate of Alston Wilson, the father of the other defendants, such administrator was also made a party defendant, and he was by the preliminary writ enjoined from paying to the defendants, heirs of Alston Wilson, "the purchase money arising from the sale of the lands belonging to the estate of Alston Wilson, deceased, by distributing the said purchase money among said heirs, except in excess of the sum of \$700 thereof"; that being the sum deemed sufficient to reimburse complainant for the money paid for said timber and received by defendants, the interest thereon, and costs of suit. Upon motion duly made the chancellor dismissed the bill for want of equity, and from that decree the appeal is taken.

It is conceded—indeed, it is alleged in the bill—that the title of the purchaser at the administrator's sale is paramount and superior to any right of the complainant growing out of the purchase of the growing timber from the dowress and life tenant. Her interest existing only for life, her conveyance could not impair the remainder.—*Smith v. Cooper*, 59 Ala. 494. Nor could she commit or authorize the commission of waste.—*Alexander v. Fisher*, 7 Ala. 514. The administrator *de bonis non*, therefore, had the clear legal right to seek a sale for division among the heirs of Alston Wilson of the lands in question, and such sale carried the standing timber, constituted a portion of the realty. Moreover, the right of his heirs to receive the proceeds of said sale was entirely independent of any right they had to participate in their mother's estate after the payment in due course of administration of all debts and demands against her, and had no relation whatever to any liability for the benefit of her creditors resting upon them in respect of the division among themselves, without administration, of their mother's money and other property. If the covenant of Susanna Wilson was broken during her life, the complainant had a remedy by action at law against her for the breach. If the covenant was broken after her

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death, or if a remedy for a previous breach was, after her death, to be sought for the protection of the covenantor or its assignee, the appointment of an administrator was first necessary, and a suit against such administrator would afford the proper remedy. The purchaser of the timber or its assignee had no lien upon the money paid therefor, either in her hands or in the hands of her children, that would authorize a bill in equity against her or the children to obtain a personal decree for the purchase price. When, as in this state, the lands as well as the personal property are liable for a decedent's debts, a claim for damages for a breach of the decedent's contract will not lie against the heirs in the first instance. The claim for damages should be presented in due course of administration, and be asserted against the personal representative.—8 Am. & Eng. Ency. Law, p. 162; *Russ v. Alpaugh*, 118 Mass. 378, 19 Am. Rep. 464. It may be complainant might maintain an action for money had and received against the mother's heirs, who received the money; but this, if true would not give the bill equity.

Presenting, therefore, no claim which could be asserted in equity against the heirs of Susanna Wilson in the manner attempted by this bill, the bill must fail for want of any substantial support. Obviously, therefore, the court of chancery could not, by a species of equitable attachment or garnishment or by an injunction against distribution, seize and hold in *gremio legis* the moneys of the defendants, coming to them as heirs of their father, to satisfy a decree which the complainant could never obtain. Furthermore, "an estoppel on the part of the mother shall not bind the heir when he claimeth from the father." Coke, Litt. 365b. An heir claiming an independent title in himself is not estopped to assert it by the mere force of covenants of his ancestor.—*Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464.

The principle of law invoked by appellant, that one should not be permitted to convert property into money by a sale, and, the conveyance failing to pass title, hold on to the purchase money and at the same time take back

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the property, has no application under the facts averred and does not serve to impart equity to the bill. The chancellor committed no error in dismissing the bill. Its dismissal operated to dissolve the injunction, and, the injunction having been reinstated by a supersedeas bond, its dissolution will be accomplished by the affirmation which must be here entered.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

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Bill to Construe Contract, and to Enjoin Interference With Subject Matter Thereof. Cross Bill Seeking Affirmative Relief.

(Decided June 30th, 190. 41 So. Rep. 831.)

1. *Injunction; Preliminary Injunction; Dissolution; Denial of Equity.*—Where the allegations of the bill, on which its equity depended, are fully, directly and completely denied in the answer, and no equity appears, by the case made, why the injunction should be retained, its dissolution should be decreed.
2. *Equity; Cross Bill; Dismissal of Original Bill; Effect.*—Where the cross bill prays for affirmative relief, and alleges additional facts relating to the subject matter of the original bill, not therein alleged, the dismissal of the original bill for want of equity does not carry the cross bill with it, but the cross bill may be retained for the purpose of granting the relief sought therein.
3. *Injunction; Cutting Timber; Cross Bill; Sufficiency.*—To the original bill seeking to construe the contract of lease and enjoin interference with its subject matter, respondents filed a cross bill, alleging that complainant in the original bill, had, under the lease contract for cutting timber of certain dimensions, removed timber from the lands without paying therefor, under the temporary injunction granted on original bill; that complainant had also cut and carried away the most

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valuable trees and left standing the less valuable ones; had so mixed the timber cut under the contract with timber cut from other lands, that it was impossible to separate same; that the value of the timber cut was more than \$1,000.00 and because of the violation of the terms of the contract respondents had elected to cancel same and had so notified complainant, who disregarded such notice, and continued to cut and remove the timber; that complainant was insolvent, and would continue the acts complained of, unless restrained, and respondents would suffer irreparable loss, for which they had no adequate remedy at law. Held, to state a case for equitable relief by injunction.

4. *Injunction; Preliminary Injunction; Affidavits.*—Affidavits are admissible in support of the allegations of a bill seeking injunction, in case of waste and where irreparable injury might ensue, if the injunction be not granted.

APPEAL from Elmore Chancery Court.

Heard before Hon. W. W. WHITESIDE.

The bill in this case was filed by appellant against appellees, seeking to have a contract attached thereto construed and to enjoin appellees from interfering with the conduct of appellant's business in reference to the subject-matter of the contract, and to enjoin an attachment suit begun by appellees against appellant and levied upon certain property of the appellant. Appellees filed an answer specifically denying the allegations of the bill, and a cross-bill asking for affirmative relief, the allegations and purposes of which are sufficiently set out in the opinion. On a final hearing, the chancellor dissolved the injunction, dismissed the bill, but retained the cross-bill, and granted appellees affirmative relief thereunder.

The contract to be construed, as set out in the exhibit to the bill, was in the following language: "That this contract, entered into by and between T. E. De Bardeleben and her husband, E. L. De Bardeleben, of the first part, and A. M. Webster of the second part, made and executed on the 10th day of October, 1904, witnesseth, that parties of the first part have this day bargained and sold to the party of the second part all the pine and poplar trees that will square 20 cubic feet in one stick, which are now or may be growing or situated upon the land herein below described at this time or at any time before the 1st

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day of January, 1910, and for the price below named and conditions set forth. (Here follows a description of the land.) Now, in consideration of the premises as above set forth, the party of the second part agrees to purchase all the pine and poplar timber that will square 20 cubic feet in one stick, except as otherwise provided, and to cut and remove the same between the 1st day of January, 1905, and the 1st day of January, 1910, and to pay the parties of the first part the price of two cents per cubic foot for all the timber cut under the terms of this contract; the first payment to be made 60 days after the party of the second part commences to cut said timber, and to be for all the timber scaled up to that time at mill. And the party of the second part agrees to pay to the party of the first at the end of each 60 days thereafter for all the timber which has already been scaled. It is agreed and understood between all of the parties of this contract that the party of the second part shall have the right to make roadways and erect sawmills and other machinery on said land, and to travel over said land, and to do and perform any other act that will be necessary to cut and remove said timber off of said lands, provided the party of the second part does not damage any growing crop on the lands in cultivation. It is agreed that this contract shall go into effect on the 1st day of January, 1905, and expire on the 1st day of January, 1910. It is further understood and agreed between the parties that should either one of them violate any of the terms of this contract, then the same shall be null and void, and not binding on the other party." It was signed in duplicate by all the parties thereto on the day and date above written.

F. W. LULL and E. S. THIGPEN, for appellant.—A motion to dismiss the bill for want of equity should be sustained only when after admitting all the facts apparent upon the face of the bill the complainant can have no relief.—*Coleman v. Britt*, 30 So. Rep. 364; *Gardner v. Knight*, 27 So. Rep. 298; *Pinkston v. Boykin*, 30 So. Rep. 398; *Sherrer v. Garriesos*, 111 Ala. 228. An injunction will not be dissolved on the answer unless it is responsive to the bill or when it sets up new matter in avoidance of

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the equity thereof.—*Bolling v. Roman*, 95 Ala. 518; *Steiner v. Schloze*, 105 Ala. 607; *Jackson v. Jackson*, 91 Ala. 293; *Rembert v. Brown*, 17 Ala. 667. The case made by the bill comes clearly within the exception noted in the following cases: *Whitby v. D. L. Co.*, 89 Ala. 493; *Weems v. Robert*, 96 Ala. 378; *Harrison v. Yerby*, 87 Ala. 185. The dismissal of the original bill carried with it the cross bill.—*Wilkerson v. Roper*, 74 Ala. 140; *Abels v. Planters Ins. Co.* 92 Ala. 386; *Etoicah M. & M. Co. v. Wills Valley*, 121 Ala. 675; *Ex parte Jones*, 133 Ala. 214; *Meyer v. C. L. Co.* 133 Ala. 554.

J. M. HOLLY, D. D. ASKEW, and MARTIN & MARTIN, for appellee.—The cross bill was properly retained as it made a case of matters connected with those of the original bill meriting relief apart from that sought by the original bill.—*Meyer v. Calera L. Co.* 133 Ala. 557; *Etoicah M. & M. Co. v. Wills Valley*, 121 Ala. 672; *Wilkerson v. Roper*, 74 Ala. 140. Equity had jurisdiction to annul the contract.—3 Pomeroy Eq. Sec. 1377; Story's Equity (10th Ed.) Sec. 703; *Hurst v. Thompson*, 73 Ala. 158; *Davis v. Roberts*, 89 Ala. 402; *Stewart v. Cross*, 66 Ala. 22; *McWilliams v. Jeskins*, 72 Ala. 480. The appeal having been taken more than thirty days after the decree the assignments relating to the writs of injunction cannot be considered.—*Blackburn v. Huber M'fg. Co.* 135 Ala. 598.

HARALSON, J.—The case is to be considered in two aspects. The first is, whether under the original bill, as filed by the complainant therein, A. M. Webster, the appellant here, against De Bardelaben and wife, the appellees, he was entitled to the relief he sought in the perpetuation of the preliminary injunction granted to him. The chancellor denied such relief.

When the allegations of a bill, "upon which its equity defends, are fully, directly and completely denied in the answer, and none appears by the case made, why the injunction should be retained," it should be dissolved.—*Brooks v. Diaz*, 35 Ala. 601; *Robertson v. Walker*, 51

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Ala. 487; *Rice v. Tobias*, 83 Ala. 351, 3 South. 670; 1 High on Injunctions, § 162, Id. §§ 1470, 142.

In this case, all the material averments of the bill are denied with that positiveness and clearness required by this rule. In addition the affidavits introduced, as was held by the court below, abundantly fortified the denials of the answer.

There was a difference between the complainant and the defendants, in their construction of the contract between them, as to how the timbers cut by complainant were to be measured, the complainant contending, that he was to pay two cents per cubic foot, measured or scaled after it was squared at the mill, while the contention of the defendant was, that he was to receive two cents per cubic foot measured as round timber. It must be admitted that there is some indefiniteness in the contract as to this matter. The chancellor held, that by a proper construction, the contention of the defendants was the proper one. The contract sets out, that complainant "agrees to purchase all of the pine and poplar timber that will square twenty (20) cubic feet in one stick, except as otherwise provided, and to cut and remove the same, between the 1st day of January, 1905, and the 1st day of January, 1910, and to pay the parties of the 1st part, the sum of two cents per cubic foot, for all the timber cut under the terms of this contract, the first payment to be made sixty days after the party of the second part, commences to cut said timber, and to pay for all the timber scaled up to that time at the mill," and so to pay, at the end of each sixty days thereafter, for all timber which has been scaled.

It was further agreed, "that should either one of them violate any of the terms of the contract, then the same shall be null and void, and not binding on the other party."

One of the purposes of the bill, as indicated in its prayer was and is to obtain a judicial construction of the contract of lease from respondents to complainant. The prayer is, that upon final hearing of the cause, "your honor will construe the contract shown by Exhibit A to this bill, existing between the said De Bardeleben and

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the complainant, and enforce the rights of the complainant therein, and will direct the register to hold a reference and ascertain thereat, what sum is due by complainant to said De Bardeleben, and for an injunction restraining defendants, their agents and servants, from interfering with, in any manner, the conduct of complainant's business until the further order of this court, by themselves, their agents and employes," etc.

It thus fairly appears, that the purpose of the bill was two-fold,—the construction of the contract of lease and for the injunction on account of alleged interference by the De Bardelebens with complainant in the prosecution of his business, under his lease from them. If the object of the bill were only to have a judicial construction of a disputed stipulation in a lease, no element of trust being involved, it could not be maintained.—*L. M. & M. Co. v. Hannon*, 93 Ala. 87, 9 South. 539. But this object may be regarded incidental to the other purpose of the bill,—to procure the injunction referred to.

The defendants, besides the answer filed, also filed a cross-bill, setting up additional facts relating to the same subject matter as, but not alleged, in the original bill, and prayed for affirmative relief in reference to it, and this, as we have repeatedly held presents a case of equitable cognizance, and the dismissal of the original bill does not dispose of the cross-bill. It becomes the duty of the chancellor, in such case, if he dismisses the original bill, to grant such relief under the cross-bill as would be proper, under its averments and proof, as if it were an original bill.—*Wilkinson v. Roper*, 74 Ala. 141; *Abels v. P. & M. Insu. Co.* 92 Ala. 386, 9 South. 423; *Davis v. Cook* 65 Ala. 623; *Bedell v. N. E. M. & S. Co.* 91 Ala. 326, 8 South. 494; *Meyer v. C. L. Co.* 133 Ala. 557, 21 South. 938.

Whether such relief can be granted under the cross-bill constitutes the second aspect of the case remaining to be considered.

It is averred in the cross-bill, that the complainant in the original bill, has cut and removed prior to the filing of his bill, a large lot of timber from said lands of the value of \$600 and failed and refused to pay defendants

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therefor; that he has cut and disposed of timbers without giving defendants an opportunity of measuring the same, and without paying them therefor; that he has done this under the protection of the temporary injunction obtained in the cause, and has disposed of the same in every way and as fast as he could, without reporting the same to defendants, or giving them an opportunity to see to the measurement thereof, and without paying for the same; that complainant has gone over portions of said land and cut and carried away the most valuable trees, and left standing other and less valuable ones which came within the terms of said contract, and that the cutting and disposing of such timbers at the contract price would swell the amount now due to defendants to more than 1,000; and in addition to this, complainant has so mixed and confused parts of timber cut by him from the lands described in said contract, that it would be impossible to separate the one from the other. It is further averred, that because of these violations of said contract, defendants elected to cancel and annul the same, and thereupon and before the bringing of this suit, they informed complainant of their said election, and notified him to stop the cutting of said timbers, and to cease operations under said contract, but complainant paid no attention to them, and continued to cut and remove said timbers, whereupon complainant filed this bill, and by the unfounded allegations therein procured the said writ of injunction.

The defendants affirm their election to cancel and annul said contract because of the violations thereof by complainant, and ask that the same be canceled. It is averred, that complainant is insolvent, and does not own property above his exemptions of value sufficient to compensate defendants for the damages they have already sustained and will sustain by reason of the cutting and carrying away of said timber, which complainant will continue to do, unless restrained by law; that unless so restrained, defendants will suffer irreparable loss in that said lands will be denuded of their trees, and defendants will be without adequate compensation or remedy therefor.

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The prayer of the cross-bill is for an injunction against complainant to prevent his continuance of the alleged waste, for an accounting and ascertainment of the amount due defendants by complainant for the alleged damages he has inflicted on defendants and for general relief.

There can be no doubt but that the cross-bill presents a case for equitable relief by injunction. The defendant therein,—complainant in the original bill,—answered and denied the material averments thereof. The complainants in the cross-bill introduced many affidavits to sustain the allegations of their bill and the defendant introduced others. Such affidavits are admissible in cases of waste, and when irreparable injury might ensue.—*Barnard v. Davis*, 54 Ala. 565; *Rice v. Tobias*, 83 Ala. 351, 3 South. 670; *Long v. Brown*, 4 Ala. 631, 632; High on Injunctions, § 671.

After due consideration, the chancellor was of the opinion that the complainants in the cross-bill were entitled to temporary injunction against respondent therein, as prayed for, and so ordered, upon their filing an injunction bond in the sum of \$750 payable to complainant and conditioned as prescribed. The appointment of a receiver was denied.

Upon consideration of the case as made by the bill and answer, and the cross-bill and answer thereto, and the affidavits introduced, we are unable to conclude that the chancellor erred in the decree rendered.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

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Bill for Construction of Will.

(Decided June 30, 1905. 39 So. Rep. 907.)

1. *Wills; Construction; Lapsed Legacies; Effect.*—Testatrix provided for two legacies of \$1,000 each, but the legatees died during life time of testatrix, the will provided further, that

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"all the balance of money now on hand (I mean gold and silver coin, and currency) and of which I die possessed, after the payment of the legacies mentioned herein, I bequeath ****; Held that the legacies lapsed and fell into general residuum of the state.

2. *Charities; Construction; Trustees.*—The fact that the beneficiaries of a permanent charity created by will were left to the selection of the trustees named in the will, does not limit the charity to the lifetime of such trustees, as the exercise of the power of selection would appertain to the office of trustee whether filled by the appointment of the court or by selection of the testatrix, there being no real interregnum in the office of any trust.
3. *Same; Permanency.*—When real estate is devised to trustees to apply the rents, incomes and profits to such objects of charity as might be designated by another, and conditioned that if first devise should fail, the trustees should apply such proceeds to the education of young men for the ministry; and the first object failing, the last becomes a valid permanent charity.
4. *Wills; Construction; Parties in Interest.*—A legatee under a will bequeathing to him the balance of money (meaning gold and silver coin and currency) of which testatrix dies possessed, after the payment of certain legacies, has no interest in the question of the validity or invalidity of a provision in a devise of real estate to trustees to use the income for a certain purpose as it in no wise affects his interests under the will.

APPEAL from Limestone Chancery Court.

Heard before Hon. W. T. Simpson.

Bill by John H. Hundley, executor of Mary Ann Walton, deceased, against James W. Woodruff and others, for the construction of the will of the deceased. From a decree construing the will, defendants appeal.

Item 14 of the will, discussed in this opinion, is as follows: "The balance of my real estate consists of the plantation, containing about 600 acres, known as the 'Oakwood Place,' and upon which is situated the family graveyard. I give and bequeath this land (with the exception of the graveyard, containing four acres) to John Hundley, G. W. Mitchell, and James Sloss, in trust to rent the same and apply the proceeds to such objects of charity and benevolence as the Presbytery of the State

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of Alabama of the Cumberland Presbyterian Church may indicate or designate; and, should this devise fail, then the said trustees shall apply the proceeds to the maintenance and education of young men preparing for the ministry in the Cumberland Presbyterian Church, or in any other Protestant church, said young men to be selected by the said trustees or any two of them. I add to this legacy the residum of my estate."

As qualifying this, item 15 is as follows: "Out of the rents of Oakwood, I will and desire that said graveyard be kept up in its fencing and so as to inclose said four acres decently, and to keep the right of way in good condition and repair."

J. E. HORTON, JR., and EARLE PETTUS, for appellant McDonald. CABANISS & WILLINGHAM, and CABANISS & WEAKLEY, for appellants, minor children. R. W. WALKER, MILTON HUMES, and W. T. SANDERS, for appellant Woodroof. No briefs came to the Reporter.

THOMAS C. MCCLELLAN, for appellee trustees, and OSCAR R. HUNDLEY, and HARRIS & EYSTER, for appellee Hundley. No brief came to the Reporter.

TYSON, J.—This appeal involves only two questions: One, relating to the effect of the lapse of certain legacies; the other, touching the validity of a charity. The eleventh clause of the will of the testatrix is as follows: "All the balance of the money now on hand, and of which I die possessed, after the payment of my just debts and the legacies mentioned herein, I give and bequeath to Walton McDonald, son of J. N. and Maggie McDonald, of Williamson county, Tennessee. By 'money' herein I mean gold and silver coin and currency, wherever deposited or situated." Among the legacies were two of \$1,000 each to persons who died during the life of the testatrix. The chancellor, in construing the will, held that these legacies fell into the general residuum. This ruling is assigned as error by appellant McDonald.

Of course, the lapse of legacies which are primarily a

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charge on the "money" of the testatrix will lessen that much such charges, and in that way will give to the legatee entitled to the balance of the money the benefit of the lapse; but the lapsed legacies themselves, as a charge upon the whole of the testatrix's property, ceased to be of any effect whatever, precisely as if they had never been inserted in the will, and therefore ceased to be a charge against the residuum of the estate. The testatrix, it appears, was at the date of her will about to undergo a dangerous surgical operation, and immediate death was contemplated as a possible result. In that view the testatrix uses in this clause, in reference to her money, the words, "now on hand." At the same time she contemplated that she might not die, and that consequently the words "now on hand" might create difficulty in their application to conditions existing at her death in after years. Therefore she made the clause ambulatory and applicable to her death at any time by the additional words "and of which I die possessed." There seems to be no difficulty whatever about the construction. The bequest only applies to the money "possessed" at her death, and only covers such money as is left after paying the valid charges put upon such money, and therefore the legatee of "the balance" only has the indirect advantage of lapsed legacies by the cancellation of such legacies as charges.

The testatrix by the fourteenth clause of her will gave a certain real property and the residue of her estate to three trustees for a charity which was held invalid by the lower court, and provided an alternative bequest for a different charity "should this (the first) devise fail." The court held the alternative devise valid, and this ruling is assigned as error. The devise is that "the said trustees shall apply the proceeds (increase of the property) to the maintenance and education of young men preparing for the ministry of the Cumberland Presbyterian Church, or in any other Protestant church; said young men to be selected by said trustees, or any two of them." By the next clause (15) it is provided that a designated family graveyard of four acres, included in the tract of

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land devised by the fourteenth clause, but excluded from the devise itself, shall be inclosed and kept up out of the rents of the land devoted to the charity. There being no assignment of error relating to the primary scheme of charity, we will consider only the objections to the alternative scheme above set out.

It is insisted that the testatrix did not intend or declare a permanent charity, but at most only a devotion of the income of the property to the maintenance and education of young men preparing for the ministry during the time they could be selected by the named trustees or any two of them. This objection would hardly be insisted on, except for the provision that the persons to be maintained and educated are "to be selected by said trustees, or any two of them." The argument is that a personal confidence was reposed in the named trustees, and therefore it was necessarily a temporary provision, operating only during the possibility of its exercise, and not existing at all after the death of the trustees. And the case of *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80, is relied on to support the contention. The provision giving the trustees, or any two of them, power to select the young men preparing for the ministry of the Cumberland Presbyterian Church, or for the ministry of any Protestant church, as recipients of the charity, is a power which would, by the law and without respect to the special provision of the will, appertain to the office of trustee. The property is given to the trustees for the defined charitable trust of applying the income "to the maintenance of young men preparing for the ministry" of the Cumberland Presbyterian Church, or any Protestant church. If all the trustees had died, the trust would not have failed. And the fact that the power of selection was expressly vested in the trustees is immaterial, as it would appertain by implication to the office, whether filled by appointees of the court or by selection of the testatrix. There may be said to be no real interregnum in the office of any trust.

"Public charities indefinite in terms are necessarily limited in their administration by the amount of the foundation (or funds available). Where the founder

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does not provide a rule or order of selection, there is, therefore, in every public charity a necessary power of selection of beneficiaries in the trustees."—*Dodge v. Williams*, 46 Wis. 70, 98, 1 N. W. 92, 50 N. W. 1103; *Russell v. Allen*, 107 U. S. 163, 167, 2 Sup. Ct. 327, 27 L. Ed. 397; *Howe v. Wilson*, 60 Am. Rep. 226, and note; *Hesketh v. Murphy*, 35 N. J. Eq. 23; *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Bullard v. Chandler*, 149 Mass. 532, 541, 21 N. E. 951, 5 L. R. A. 104; 2 Perry on Trusts, §§ 721, 731, 732; 2 Pom. Eq. §§ 1025, 1026; 6 Cyc. pp. 938-940. The case of *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80, and kindred cases, have no application here. In that case there was only a power given to the executors, or the survivor of them, after the death of a life tenant (the wife) to dispose of or appoint the property "for the use of such charitable institution in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, etc." It is plain that the charity itself was here wholly undetermined and was left to the personal confidence and discretion of the executors, and, the power never having been exercised and being impossible of execution, the devise of necessity failed, without an exercise of the doctrine of *cy pres*. which has never prevailed in this country. In the case at bar the particular charity is defined and designated with all the certainty required by law, and it is only the administrative detail of the selection of the individual object of the class to be educated, etc., which is left to the trustees. This is an uncertainty which appertains to every scheme of charity of the kind. No will individualizes the foundlings who are to be nourished, or the sick who are to be nursed, or the existing or nonexistent young men who are to be aided in a case of this character. The fact, then, that the trust empowered the trustees to select the beneficiaries, is no indication whatever that the charity was limited to their lifetime. There can be no question, on a consideration of the whole will, including the first scheme of charity (*Burrill v. Boardman*, 43 N. Y. 260, 3 Am. Rep. 694), that the testatrix intended the alternative provision under consideration as permanent.

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It is further insisted that, if the testatrix intended a permanent charity, it cannot be carried into effect, because it was coupled with a discretion in trustees, who are dead, to select the particular objects who are to receive the benefit of the provision, and because the fifteenth clause of the will provides that an undefinable part of the income is to be subtracted in perpetuity to care for the graveyard. The first objection has already been answered. The selection of the particular objects of the designated class to be benefitted is a mere administrative detail, not involving the essence of the charity, and belongs to the office of trustee, unless specially otherwise provided, and, when not specially otherwise provided, will be exercised by the court or attached to the office of trustee on failure of the particular plan.—*Bullard v. Chandler*, and other authorities cited *supra*. And the fact that there is a valid or invalid provision in the fifteenth clause of the will relating to the income of the property devoted to the charity is wholly immaterial. If the provision is valid, it will simply reduce the income of the property to the extent of the charges for keeping up the graveyard. If, on the other hand, it is invalid, it can have no effect. The appellants can therefore in no event be prejudiced by the fifteenth clause of the will, whether it is a valid or invalid provision.

We find no error in the decree of the lower court of which the appellants can complain, and it must be affirmed.

MCCLELLAN, C. J., and SIMPSON, and ANDERSON, JJ.,
concur.

[Ellis, et al. v. Crawson.]

Ellis, et al, v. Crawson.

A Bill to Have Declared Null and Void a Paper Purporting to Be a Will, and to Have the Probate Proceedings Leading Up to its Probate and the Probating of the Will Annulled and Set Aside.

(Decided June 30th, 1906. 41 So. Rep. 942.)

1. *Wills; Suit to Contest; Limitation.*—The fact that some of the heirs at law of a testatrix were barred under the statute from proceeding in chancery to contest the will, did not affect the right of a minor who was not properly represented at the probate of the will in the probate court to contest the probate of the will.—Sections 4298, 4299, Code 1896.
2. *Same; Pleading; Demurrer.*—In a suit in chancery to contest a will after its admission to probate where it was sought, in addition to setting aside the will, to have a deed from a legatee set aside, and also an injunction against the legatees grantees to restrain them from disposing of the property, the extent and character of complainant's relief being determinable in the final decree, such question could not properly be raised by a demurrer to the bill.
3. *Appeal; Review, Failure to Demur.*—The question of multifariousness of a bill cannot be considered on appeal, although argued by appellant in the absence of a demurrer to the bill raising this question.
4. *Equity; Pleading; Bill; Inconsistency and Repugnancy.*—Without being multifarious a bill may be inconsistent and repugnant in its averment.
5. *Same; Wills; Contest.*—The bill avers that the will was not attested by two witnesses, while the copy of the will attached as an exhibit thereto discloses two subscribing witnesses.—Held, not to render the bill repugnant in averments.
6. *Wills; Contest; Allegations of Grounds.*—In a contest in chancery of a will under Sections 4298-4299, the party contesting is not confined to any one ground of contest, but all the grounds of contest mentioned in Section 4287 may be alleged.
7. *Same; Sufficiency of Bill; Allegation of Fraud.*—The allegations of grounds of contest should state facts and not conclusions and the bill alleging the execution of the will procured by fraud and misrepresentation without averring any facts constituting such fraud and misrepresentation is open to demurrer.

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APPEAL from Jefferson Chancery Court.

Heard before the Hon. A. H. BENNERS.

This was a bill filed by Florence Crawson by her next friend against Bessie Ellis *et al.* seeking to have declared null and void and set aside a paper writing purporting to be the last will and testament of Martha Laws, and also seeking to have declared null and void all the proceedings in the probate court admitting said alleged paper writing to probate as the last will of said Martha Laws; also seeking to have declared the rights of complainant in the property mentioned therein, to-wit, a one-third interest; also seeking to have a deed from William Laws to Bessie Ellis and Joe Ellis conveying said property to them declared a cloud upon complainant's title, and to set aside and annul the same; it also seeks injunction against all the respondents, their agents, and attorneys to restrain them from selling, disposing of, or otherwise interfering with the property, and for a receiver to take charge of the same. The facts made by the bill are as follows: Complainant is a minor, and the only heir at law of a sister of Martha Laws. That on the 19th day of March, 1903, Martha Laws died, leaving no child or children, but leaving a husband, William Laws, and the following next of kin. (Here follows a list of the next of kin including the mother of complainant, who is alleged to have died before Martha Laws.) That Martha Laws left at the time of her death certain real estate and personal property as described in the bill. It is further alleged that Martha Laws left no will, and made no disposition of her property, but that soon after her death her husband, William Laws, presented to the probate court of Jefferson county a paper writing purporting to be the last will and testament of said Martha Laws, which was duly admitted to probate. That by said alleged will all of the property was left to the husband, and in the said paper writing the husband was nominated as executor without bond. The bill further alleges "that said paper writing was not the will of said Martha Laws, that the same was procured by the fraud and misrepresentation of William Laws and one Joe Ellis. But notwithstanding this the said William Laws'

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by fraud and misrepresentation procured the said paper writing to be probated by the probate court of Jefferson county, Ala., in May, 1903, as and for the last will and testament of Martha Laws. Complainant avers that the probating of said will or paper writing as the will of Martha Laws was obtained by the fraud and misrepresentation of William Laws and one Joe Ellis. * * * Complainant further avers that at the time the said paper writing is alleged to have been executed by said Martha Laws she was mentally unable to execute a will or to make any disposition of her property, besides she did not intend or attempt to do so, but that the whole paper writing purporting to be her last will and testament was prepared and her name signed thereto by a mark by one Joe Ellis without the knowledge or consent of said Martha Laws but by the fraud and procurement of William Laws and Joe Ellis, and that the paper writing was written out by Joe Ellis, and the witnesses' names attached thereto were signed by Joe Ellis." The bill also alleges that complainant was not legally represented during any of the probate proceedings admitting the will to probate. That after the will was admitted to probate, William Laws took charge of the property, and on the 8th day of June, 1904, executed a deed to the property to Bessie Ellis and Joe Ellis, Jr., minor children of Joe Ellis above referred to, reserving the use and benefit of the same to himself during his life. The bill also alleges that this deed was without consideration, and that the will was not signed by two witnesses. There was motion to dismiss the bill for want of equity which was overruled. The defendant then demurred to the bill and the averments thereof as being inconsistent and repugnant one with the other. That the allegations of fraud contained therein were mere conclusions and facts constituting the fraud were not set forth with sufficient definiteness and certainty. Various other grounds were assigned raising the other questions discussed in the opinion, and not necessary to be here set out. From a decree overruling these demurrers, this appeal is prosecuted.

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TILLMAN, GRUBB, BRADLEY & MORROW, for appellant. —The demurrers to the bill and to the several portions of the bill raising the question of multifariousness and that the bill contained repugnant and inconsistent allegations, were well taken and should have been sustained.—*McEvoy v. Leonard*, 89 Ala. 455; *Banks v. Speers*, 103 Ala. 406; *Tillman v. Thomas*, 87 Ala. 321. No fraud is alleged, or rather no facts are alleged constituting the fraud claimed.—*Flewellen v. Crane*, 58 Ala. 627; *Morgan v. Morgan*, 68 Ala. 80; *Chamberlain v. Dorrance*, 69 Ala. 40; *McHan v. Ordway*, 76 Ala. 347; *Bell v. S. B. & L. Asso.*, 140 Ala. 377. The allegations of the bill do not make a case of testamentary incapacity on the part of Martha Law.—*Taylor v. Kelly*, 31 Ala. 59; 4 Mayfield, p. 1140. The allegations of the bill that the will was not properly attested are not supported by the copy of the will annexed.—§ 4263, code 1896; *Merritt v. Phoenix*, 48 Ala. 87; *Sharpe v. Orme*, 61 Ala. 263; *Rogers v. Adams*, 66 Ala. 600; *Terry v. Forbes*, 94 Ala. 135. The attestation is sufficient to show prima facie that the witnesses subscribed their names in the presence of the testator.—*Woodroof v. Hundley*, 127 Ala. 640. The complainant being entitled only to a third interest in the estate, the court cannot decree that said will and probate proceedings are null and void.—§ 2299, code 1896; *Sampson v. Sampson*, 30 Pac. Rep. 979; *Bailey v. Stewart*, 2 Redf. Sur. 227. All the necessary parties were not made parties respondent or complainant to the bill.—*McGee v. Linton*, 104 Ala. 120; 94 Ala. 479; 86 Ala. 867; *Perkins v. Briarfield Co.*, 77 Ala. 403; *Nicrosi v. Calera Co.*, 115 Ala. 429.

R. H. PEARSON, and SHARPE & MILLER, for appellees. —Where a bill sets forth facts which entitles complainant to relief, it is no objection to the bill that it avers cumulative facts.—*Worthington v. Miller*, 134 Ala. 422; *Noble v. Moses Bros.*, 81 Ala. 530. A demurrer cannot properly be directed to allegations not separable from the rest of the bill and not alone constituting the basis of the relief sought.—16 Cyc. p. 274. A reading of the bill will disclose that the demurrers were properly overruled.

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DOWDELL, J.—The primary purpose of the bill is the contest of the will of Martha Laws, deceased, which had already been admitted to probate in the probate court of Jefferson county. The complainant was a minor at the time of the filing of the bill, and she files her bill by next friend. Under the averments of the bill, the right to come into the court of chancery for the purpose of contesting the alleged will, is given her by the statute.—Code 1896, §§ 4298 and 4299. The fact that some of the heirs at law of the deceased are barred under the statute by lapse of time from proceeding in chancery to contest the will does not affect the right of the complainant, who is not barred, from maintaining her bill for that purpose. And the question of the extent and character of the complainant's relief is one determinable in the final decree, and is, therefore, not properly raised by demurrer to the bill.

There is no demurrer to the bill on the ground of multifariousness, and hence that question, although argued by counsel for appellants, is one not presented by the record for consideration. There is a ground of demurrer that the bill is inconsistent and repugnant in its averments. A bill may be inconsistent and repugnant in averment without being multifarious. The alleged repugnancy is that the bill avers that the purported will was not attested by two witnesses, whereas the copy of the alleged will which is attached as an exhibit to the bill discloses that there were two subscribing witnesses. The bill avers as a fact that the will was not subscribed by two witnesses who signed as such in the presence of the testator. The copy of the will might show on its face that two witnesses regularly subscribed as such, yet it might not be true in fact.

On the contest of a will, the party contesting is not confined to any one single ground of contest. The statute (Code 1896, § 4287), in reference to the contesting of a will provides; "by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of unsoundness of mind of the testator, or, of any other valid objections thereto." Any

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objection which goes to the validity of the alleged will is a ground of contest. And all of the grounds of objection to the validity of the will may be averred in the contest. And the same thing may be done where the proceeding to contest is by a bill in chancery. Good pleading, however, requires that in stating the grounds of the contest facts should be averred, and not conclusions. The bill in this case, as the ground of contest, avers that the execution of the alleged will was procured by fraud and misrepresentation, without averring any facts constituting the alleged fraud and misrepresentation. This is an insufficient averment, and in this respect the bill was open to demurrer. The rule is, where fraud is charged, facts constituting the fraud should be stated.—*Flewellen v. Crane*, 58 Ala. 628; *Morgan v. Morgan*, 68 Ala. 80; *Chamberlain v. Dorrance*, 69 Ala. 40; *Bell v. So. Building Loan Ass'n*, 140 Ala. 377, 37 South. 237, 103 Am. St. Rep. 41; 2 Brick. Dig. 330. The ground of demurrer assailing the bill in this respect was well taken, and should have been sustained.

The bill avers that said Martha Laws was "mentally unable to make a will" at the time of making the alleged will. It may be that this may be taken as an averment of that "unsoundness of mind" which incapacitated her to make a will, but the bill in this respect might be improved.

For the error pointed out, the decree will be reversed, and one here rendered sustaining the demurrer to the part of the bill as indicated above.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON, and DENSON, JJ., concur.

[Ensley Development Co. v. Powell.]

Ensley Development Co., v. Powell.*Bill for Injunction and Receiver.*

(Decided Jan. 31, 1906. 40 So. Rep. 137.)

1. *Courts; Jurisdiction; Constitutional Provisions; Statutes.*—Acts 1894-95, p. 881, the act which confers chancery powers and jurisdiction upon the circuit courts of Jefferson and other counties, is not unconstitutional.
2. *Constitutional Law; Limitation of Powers.*—The legislative branch of the State government has supreme power in the enactment of laws, except where this power is limited by the constitution.
3. *Judges; Proceedings in Vacation; Appointment of Receivers.*—Under acts 1894-95, p. 881, the judges of the circuit court of Jefferson county have power and authority to appoint receivers in vacation.
4. *Receivers; Appointment; Notice.*—A receiver should not be appointed in *ex parte* proceedings upon the application of stockholders to dissolve a corporation, under the provisions of Acts 1903, p. 337, until after personal notice to resident, and published notice to non-resident, stockholders, and not then without proof as required; unless in case of great emergency otherwise allowed by law.
5. *Same; Notice to Corporation; Sufficiency.*—Upon application for a receiver, a letter from the V. president of the corporation to an attorney stating that the appointment of a person, therein named, as receiver, would be satisfactory to him, especially when it is not shown whether the letter was written before or after the appointment of the receiver, and the letter was not signed by the officer in his representative capacity, such letter is not a waiver of notice by the corporation, nor does it show notice to the corporation.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. Coleman.

This was a bill filed by Charles B. Powell as the administrator of a stockholder against the Ensley Development Company et. al. for an injunction to restrain certain corporate acts and for a receiver. From a decree appointing a receiver respondents appeal. The facts are sufficiently stated in the opinion.

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CABANISS & WEAKLEY, for appellant. There was an entire want of authority on the part of the judge of the tenth judicial circuit to appoint a receiver. The appointment was made not by the circuit court of Jefferson county but by the Honorable A. A. Coleman, in vacation.—Acts 1903, p. 338; *Ex parte Farquhar & Son*, 99 Ala. 375; *Rogers v. Torbett*, 58 Ala. 523; 8 A. & E. Ency. of Law, p. 23, note 1.

Acts 1894-95, p. 881, limit the powers of the circuit court and of the judges while holding the court and does not confer power on a circuit judge in vacation to appoint a receiver without notice. Authorities *supra*; *James' Case*, 138 Ala. 594; *Cooley's Case*, 132 Ala. 592; *Newman v. Hammond*, 46 Ill. 36; *Ellis v. Karl*, 7 Neb. 381; 11 Cyc. 682. The Acts approved Feb. 18, 1895, Acts 1894-5, p. 881, is violative of the constitution.—*Nugent's Case*, 18 Ala. 524; *Roundtree's Case*, 51 Ala. 42; *Winter v. Sayre*, 118 Ala. 1. Prior to the constitution of 1901, the Legislature had no authority to confer chancery jurisdiction upon the circuit courts.—Authorities next above; *Ferris v. Higley*, 87 U. S. 375; *Vail v. Dimming*, 44 Mo. 210; 65 N. C. 379; 44 N. J. L. 118.

The appointment of a receiver, upon an *ex parte* application is never tolerated except in cases of the greatest emergency, for the prevention of irreparable injury, or in cases where the defendant has absconded and willfully puts himself beyond the jurisdiction of the court.—*Gilreath v. Union Bank & Trust Co.*, 121 Ala. 204; *Alderson on Receivers*, Sec. 124. The case made by the bill does not bring it within the rule.—*Little Warrior Coal Co. v. Hooper*, 105 Ala. 663; *Bank of Florence v. U. S. & L. Co.* 104 Ala. 294; *High on Receivers*, Sec. 111, and authorities *supra*.

CHARLES B. POWELL, for appellee.—The appeal should be dismissed for the reason that under the judgment of the court no such corporation as appellant exists.—*Nelson v. Hubbard*, 96 Ala. 238. The circuit judge of the tenth judicial circuit has authority to issue the injunction and to appoint the receiver.—Sec. 799, Code of 1896; Acts 1894-5, p. 881; *Bruce v. Ludekin*, 19 Cal. 170; *God-*

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dard v. State, 2nd Yerger, 104; *Columbus v. Hydraulic W. M. Co.* 33 Ind. 436; *Dyckman v. McDonald*, 5 How. Pr. 121. Conceding the well established doctrine that it should be a very strong case sustained by strong affidavits to justify the appointment of a receiver the case made by the bill brings it within the rule justifying the action of the court.—*Edison v. Edison*, 52 N. J. Eq. 620; *Jasper Land Co. v. Wallace*, 123 Ala. 655; *Sternberg v. Woolf*, 39 L. R. A. 762.

Sec. 50, p. 338 of the Acts of 1903, justifies the appointment in this case.—*Cook v. East Trenton Co.* 53 N. J. Eq. 29; *Atlantic Trust Co. v. Consolidated Co.* 49 N. J. Eq. 402; *Albert v. Clarendon*, 53 N. J. Eq. 623.

SIMPSON, J.—This was a bill filed by a stockholder for injunction and receivership, as to a corporation. The injunction was granted and receiver appointed by the judge of the circuit court of Jefferson county.

It is contended in the first place, by appellant, that Acts 1894-95, p. 881, by which chancery jurisdiction was conferred on the circuit court of Jefferson county, is unconstitutional. In determining whether or not an act is violative of our State constitution, there are certain principles which have been so clearly enunciated by the courts as to become axiomatic. The first and cardinal rule is that the state constitution is a limitation, not a delegation, of power, so that the legislature has supreme power, except where limited or forbidden by the constitution. See authorities cited in 2 Mayfield's Dig. p. 684. Chief Justice Brickell has said also that: "There can be no just construction or interpretation * * * * which is not deduced, not only from the words, but from the history of any particular part or provision of the instrument."—*State ex rel. Winter v. Sayre*, 118 Ala. 28, 24 South. 89.

Looking, then, to the history of our constitutional provisions in regard to the jurisdiction of the circuit and chancery courts, we find that, in the original constitution of 1819, article 5, § 1, provides that the judicial power of the state shall be vested in one supreme court, circuit courts, "and such inferior courts of law and equi-

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ty * * * as the general assembly may from time to time, direct, ordain and establish." Section 6 provides that the circuit courts shall have original jurisdiction in all matters, civil and criminal, not otherwise excepted in this constitution, but in civil matters only where the sum in controversy exceeds \$50. Section 8 of the same article authorizes the general assembly to establish a court or courts of chancery with original and appellate equity jurisdiction, and provides that, "until the establishment of such court or courts, the said jurisdiction shall be vested in the judges of the circuit courts respectively. Provided, that the judges of the several circuit courts shall have the power to issue writs of injunction, returnable into the courts of chancery." These provisions were continued in the same words in the Constitution of 1861 (article 5, §§ 1, 5, 7), except that, as the general assembly had already established courts of chancery, the sentence requiring the judges of the circuit court to exercise the jurisdiction of equity courts, until the chancery courts were established, is omitted. The provisions then are the same in the constitution of 1865; and in the constitution of 1868 the provisions are the same except that in article 6, § 1, the judicial power of the state is vested in "the senate, sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, probate courts," and such inferior courts, etc. And in the fifth section of said article, conferring jurisdiction "in all matters civil and criminal" not otherwise excepted, on the circuit court, there is a proviso that the circuit court shall have equity jurisdiction, concurrent with the courts of chancery in all cases of divorce, and in cases in which the matter in controversy does not exceed \$5,000. In the constitution of 1875, under which the law in question was enacted, these provisions are substantially the same except that the proviso giving the circuit court equity jurisdiction in divorce cases, and in cases wherein the amount in controversy does not exceed \$5,000, is omitted, and, while retaining in section 7 of article 6, the clause that the general assembly shall have power to establish courts of chancery, it goes on and directs that the state shall be divided into chancery

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divisions and districts, in each of which divisions there shall be a chancellor, and requires a chancery court to be held in each district at least once in a year.

It will be observed that, while it is true that, at the time of the adoption of our constitutions, common-law courts and courts of equity had a defined meaning, yet the chancery courts were established in England to dispose of certain classes of cases, because of the extreme technicalities which had grown up in the common-law courts, disabling them from doing complete justice in such cases; and it is further a fact of history that the tendencies of modern legislation have been to round off the asperities of the common-law forms and to adapt the proceedings in such courts to a more equitable disposition of controversies, and it is not uncommon to combine the two in one court. It will be noted also that our own constitutional history on this subject shows that it has not been considered at all incongruous to confer chancery jurisdiction on the circuit court. On the contrary, until within a comparatively recent period, it has been entirely optional with the legislative department whether or not we should have a separate chancery court at all, and the constitution itself made it incumbent on the circuit court to administer equity, until a court of chancery should be established, and, when the chancery court was definitely provided for by the constitution, it did not prohibit the legislature from giving the circuit court concurrent jurisdiction, in equitable matters, nor did it provide that the jurisdiction of the chancery courts should be exclusive. In fact the constitution does not define what shall be the jurisdiction of said court except as that may be inferred from the use of the word chancery; and in one of our constitutions the circuit courts were given concurrent jurisdiction in certain matters. It is a matter of legislative history also that jurisdiction has been conferred on the chancery court in matters in which the law courts had jurisdiction, and the effect of the same has been declared by our court to make the jurisdiction concurrent. It is a fact also that jurisdiction has been conferred on the probate court of some matters in which the chancery court previously had

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jurisdiction, and of some in which the common-law courts had jurisdiction, and the constitutionality of such enactments has never been questioned. Section 5 article 6 of the constitution of 1875, like the others, confers upon the circuit court jurisdiction in all matters civil and criminal. The word "civil," when used in connection with "criminal," includes all matters of controversy except offenses against the state, not excepting equity suits.—6 Am. & Eng. Ency. Law, p. 34, and note 3, also page 96 and notes; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *Feustermacher v. State*, 19 Or. 506, 25 Pac. 142. The words in this section "not otherwise excepted in this constitution" are not words of prohibition on the legislature, but simply words of description as to what jurisdiction is conferred absolutely on the circuit courts, and, while it may be true that the establishment of courts of chancery may be such an exception, so as to show that the circuit court does not necessarily retain equity jurisdiction, yet it is not a prohibition on the legislature from conferring concurrent jurisdiction. So, the proviso in the 6th section that the judges of the several circuits "shall have power to issue writs of injunction returnable into courts of chancery" only shows that this is a power which is distinctly reserved, so that the legislature cannot take it away, and, while it may indicate that it was not the intention of the constitution to confer absolutely on the circuit courts jurisdiction in other equitable matters, yet, under the first general principle referred to, it cannot be construed as a prohibition on the legislature from conferring additional powers and jurisdiction. In fact, the point in this proviso seems to be the power to make a writ returnable to another court. The jurisdiction of the chancery court is not interfered with by this act, as it still remains, with all of its original powers. This is not the substitution of one court for the other, nor the taking away of jurisdiction from one and conferring it on the other.

In a case in Texas, where the constitution provided that a district judge should hold the regular terms at one

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place in each county, it was contended that this, by necessary implication, prohibited the legislature from creating more than one judicial district in a county, but the court held otherwise, stating that "An intention to restrict the power of a state legislature * * * further than is done by express limitations is not to be presumed; and when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the constitution which require such implication."—*Lytle v. Halff* (Tex. Sup.) 12 S. W. 610. In Ohio, where the constitution conferred on probate courts jurisdiction in the appointment of administrators and guardians, etc., it was held that an act conferring jurisdiction on the court of common pleas to appoint guardians of the property of intemperate persons was not prohibited by the constitution.—*Hagany v. Cohnen*, 29 Ohio St. 82. And in a subsequent case, although the case went off on another proposition, the court cites this case with approval, and states; "We find no case holding that this section of the constitution confers exclusive jurisdiction upon the probate court."—*State ex rel. v. Archibald*, 52 Ohio St. 1, 5, 38 N. E. 314. In our own court, where the constitution authorized the legislature to establish courts of probate "for the granting of letters testamentary and of administration and for orphans' business," it was held that "there is no prohibition against conferring upon such courts judicial cognizance of matters which are also within the jurisdiction of other courts."—*Balkum v. State*, 40 Ala. 671, 677. This court also sustained the constitutionality of an act conferring on the probate court jurisdiction in condemnation proceedings.—*N. O. M. & T. R. R. v. S. A. T. Co.* 53 Ala. 211, 223. In the Nugent Case, referred to in the brief of appellant, the only question decided was that a court created by act of the legislature, whose judgments were subject to appeal to the supreme court was an "inferior court," within the meaning of the constitution, although not subject to any revisory power in the circuit court, and the remarks of the court cited in their brief, besides being mere dicta, were referring to the powers of the courts by virtue of the constitutional

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provisions, and had no reference to such powers as the legislature might distinctly confer on them. It may be admitted that no equity jurisdiction remains in the circuit court by virtue of constitutional provisions, but that does not mean that the legislature is prohibited from conferring the same on it.—*Nugent v. State*, 18 Ala. 521. In the *Roundtree Case*, cited by appellant's counsel, the only additional point decided was that, as the constitution required judges of inferior courts "to be elected by the voters of the district subject to the jurisdiction," the act in question was unconstitutional, because it made the judge of the fourth judicial circuit judge of the inferior court of law and equity attempted to be established at Decatur; the argument being that every voter in the district affected might vote against a man, and yet by votes in other counties he might become judge of their local court.—*Ex parte Roundtree*, 51 Ala. 42.

In the case now before the court, the judge of the circuit court is elected by the qualified voters, where he exercises his functions, and the chancellor who has been elected by them still has the same jurisdiction as he had before. It is merely a matter of concurrent jurisdiction which is entirely within the power of the legislature. Section 148 of the constitution does not necessarily show that the power did not exist before in the legislature; but, in view of the fact, which is presumed to have been known to members of the convention, that legislation of this character had been adopted and acted on for years, it is rather in the nature of a recognition of the policy and for the purpose of placing at rest any doubts which may have remained in the minds of any as to its constitutionality. The Act is not unconstitutional.

It is next insisted that, even although it be held that the circuit court of Jefferson county has chancery jurisdiction, under said act, yet that does not authorize the judge of said court to appoint a receiver in vacation. The first section of said act confers upon said circuit court "the same jurisdiction now conferred by law on courts of chancery," and that necessarily carries with it the power and duty of the presiding judge to make all

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orders and decrees for the proper disposition of cases pending therein, and in the same manner, as could be done by the chancellor, if the case were in the chancery court. This is made evident by the further provisions of the act. Section 2 (page 882), provides that "any circuit judge holding court" in said counties "shall perform the same duties in equity cases pending in said circuit courts as are now required by law of chancellors holding chancery court in the several counties of the State." Counsel for appellant contends that the meaning of this section is such that duties shall be performed only while said court is in session. The section will not bear that interpretation because that had been provided for by the first section, as the duties performed while the court is in session are the acts of the court. The section does not provide that the judge when holding court shall perform the same duties as the chancellors do while holding court, but the meaning evidently is that the judge who holds said court shall perform said duties when he is simply judge and not court, as the chancellors who hold chancery court do as chancellors, and not as the chancery court. This intention is further shown by the third section, which provides that the chancery rules of practice shall apply. The first rule of chancery practice is that the courts "shall be deemed always open * * * for making by and before the chancellor all interlocutory motions, orders, decrees and other proceedings not affecting the merits of causes, but preparatory to their hearing upon the merits."—Code 1896, p. 1202. The legislature cannot be presumed to have intended that the circuit judge, who stands in the place of a chancellor with equal jurisdiction, should have less power in regard to these interlocutory matters than the register has. We hold, then, that the powers of the circuit judges in said county, in equity cases pending in said circuit courts, are the same as those possessed by chancellors. The cases cited by counsel referring to rendering decrees in vacation do not have any bearing upon these interlocutory matters.

It is admitted by the appellee that it is the "established doctrine in this state that it should be a very strong

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case, sustained by strong affidavits of the facts and urgency, to justify the appointment of a receiver, where there is no bond given, or notice of the application"; but this court has expressed itself in stronger terms, to wit: "It may be regarded as elementary law that a receiver should not be appointed except upon a bill or petition filed praying it, and after answer thereto, unless the necessity be of the most stringent character, without consent of all parties to the record."—*Jordan v. Jordan*, 121 Ala. 419, 421, 25 South. 855. And, as stated in another case (quoting from *High on Receivers*): "It must be clearly shown that the delay which would result from giving notice would defeat the rights of plaintiff, or would result in great injury to him."—*Gilreath v. Union Bank & Trust Co.* 121 Ala. 204, 208, 25 South. 581. It is a part of the judicial and legislative history of this country that frequently unfair advantages have been gained by parties, and wrongs perpetrated, by the hasty appointment of receivers on ex parte applications. And our statute provides that, "when application is made in vacation, reasonable notice of the time of such application, and the person to whom it will be submitted, must be given or a good reason shown to the chancellor or register for the failure to give the same."—Code 1896, § 799. The record shows that the bill was filed July 19, 1905; that the receiver was appointed and made bond on the same day; that the summons was not served on any one before July 21, 1905, and no notice of the application for a receiver given.

Appellee claims that J. W. Minor, vice-president of the corporation, had notice of the application, and approved the appointment; but the only evidence of this in the record is a letter to C. B. Powell, attorney, dated July 19, 1905, signed by J. W. Minor, J. H. Eubank, and stating that "the appointment of F. E. Blackburn as receiver" would be satisfactory to them. It is not shown whether this letter was written before or after the order of the court for the appointment of a receiver. Besides the fact that this seems to be merely an expression as to the personality of the receiver, and no agreement that a receiver should be appointed, it was not signed by Minor

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in his official capacity, and does not show that he was acting for the company, and it does not appear anywhere in the record that he is the vice-president. On the contrary, the bill states "that the affairs of the corporation are under the complete control of the said Douglass H. Gordon and Eugene F. Enslen." This paper does not show a compliance with the requirements of the law.

Appellee relies next on section 50, p. 338, Gen. Acts 1903, and seems to construe that act as giving the absolute right to the appointment of a receiver without notice. There is nothing in said act which shows any intention to repeal the statutes in our code referred to, nor in any way to change the principles of law declared by our court. On the contrary, the act shows a clear intention to adhere to the same safe principles in regard to this important subject. Section 49 (page 337) provides for a dissolution on petition of two-thirds of the stockholders, but requires personal notice to all resident stockholders and publication as to nonresidents, and that action shall be only at a regular term of the court after 30 days' notice. Then section 50 authorizes creditors and stockholders to apply to the "court" for the appointment of a receiver, and authorizes the court, after being satisfied from the affidavits and after such notice to the corporation, if any, as the court may prescribe, to "proceed to hear the proof which may be offered by the parties, and upon such hearing it appears," etc., it may issue an injunction, and may appoint a receiver. Besides the fact that the entire sections show evident purpose to bring the opposing party in, and only appoint the receiver after both parties have been heard, it will be observed that the power is distinctly conferred on the court, and not on the judge. Whatever may be said about the court and the judge being synonymous, while the court is in session, and while, as before stated, it may be that the conferring of entire jurisdiction of certain matters on the court may authorize the judge to perform all those services which are usually necessary even in vacation, yet there is a clear distinction between the court (while in session) and the judge (in vacation), and when a distinct matter is clearly committed to the

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court, in such terms as to indicate a purpose to have an investigation, both parties being present, and a judicial ascertainment of the facts, we cannot suppose that the lawmakers intended that the receiver should be appointed on an ex parte proceeding, except in the cases of great emergency otherwise allowed by law. It may be that the words "if any," in reference to the notice, may refer to those cases of great emergency, when it is necessary to appoint a receiver without notice, in order to preserve the property from destruction; but it certainly cannot mean to dispense with notice, in any other cases than those excepted by our decisions, as before quoted. In the present case there are no allegations of facts showing any special emergency, and proof of such.

There is no proof before the court of the matters alleged in the motion to dismiss the appeal. The motion to dismiss the appeal is overruled. The judgment of the court is reversed, and a decree will be here entered directing the receiver to surrender and deliver to the said Ensley Development Company, its officers or authorized agents, all and singular the property and assets of said Ensley Development Company heretofore delivered to said receiver by said Ensley Development Company or received by him otherwise under the order appointing said receiver, and the cause is remanded.

Reversed and remanded.

TYSON, DOWDELL, and ANDERSON, JJ., concur.

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Bill to Declare an Instrument a Will and to Require a Redelivery of the Property to Wife on Dissent.

(Decided Dec. 19, 1905. 40 So. Rep. 104.)

1. *Husband and Wife; Personal Property of Husband; Right of Disposition.*—A wife, during the life of the husband, has no

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vested right in the personal property of the husband, and he may dispose of it by delivery as he sees fit.

2. *Wills; Gifts of Personality; Testamentary Disposition.*—The donor delivered to a trustee certain bonds, under a written instrument reserving to himself the interest arising from them during life, and directing the trustee, upon donor's death, to deliver the bonds to the person named in the writing; Held, are irrevocable disposition of the bonds, not testamentary in character, by which title passed out of donor, and not invalid as against donor's wife.

APPEAL from Fayette Chancery Court.

Heard before HON. JOHN C. CARMICHAEL.

This was a bill by Lou Robertson, as the administratrix of the estate of Walter S. Robertson, deceased, alleging that she was the wife of said Robertson, and that during his lifetime he was the owner of six Alabama bonds in the sum of \$1,000 each; alleging, further, that F. M. Robertson was in the possession of these bonds, and on demand had refused to deliver same to her, as the administratrix, or as the wife of said decedent, but claimed to hold them under an instrument creating him trustee for certain persons named in the instrument giving the bonds to him as trustee, and purporting to have been executed by the decedent in his lifetime. The bill further alleges that at the time of the execution of such instrument, after expressly denying its execution by the decedent, the decedent was in a low state of health and very much under the influence of his older brother, said F. M. Robertson, and also alleges other facts tending to show undue influence on the part of decedent's brother. The bill also alleges a dissent of the wife from the instrument which is alleged to be the will of the decedent, and alleges in the alternative that the instrument which is set out in the bill was intended to be a gift, and that the gift was never completed in the lifetime of the decedent. The instrument was in words and figures as follows: "The State of Alabama. Fayette County: Whereas, I, Walter S. Robertson, am the owner of six Alabama state bonds hereinafter described, and on account of the love and affection I have for my sisters, I desire to give said bonds to them to be theirs from this day, subject

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only to my right to receive and enjoy the interest arising therefrom so long as I shall live. Now to carry out my purpose, and to vest immediately in my sisters hereinafter named the property, title and ownership in said bonds, subject to my right to receive and enjoy the interest as aforesaid, I do hereby assign, set over, and deliver (the manual delivery being now made) to my brother F. M. Robertson, as trustee, said six bonds which are described as follows: (Here follows a description of the bonds.) Upon each of which bonds I have signed and delivered a transfer, leaving the transferee blank to be filled as hereinafter directed. These bonds said F. M. Robertson is to hold and keep in his custody as trustee for all my 3 sisters hereinafter named. He is to receive the interest thereon as it falls due and pay the same over to me or to permit me to receive such interest as long as I shall live. Immediately upon my death, said trust is to cease, and said F. M. Robertson is hereby directed and required at once to deliver to my sister, Mrs. M. S. Sanford the two bonds first above mentioned. He shall deliver to my sister, Mrs. Hawkins the two bonds whose transfer numbers are given as No. 2,403 and 2,404. He shall deliver to my sister, Mrs. Robertson the two bonds bearing transfer numbers 2,405 and 2,406. And further to carry out the said purpose more fully, he is hereby directed and required to fill the blank on each of said bonds already signed by me with the names of the respective parties to whom said bonds are given that the proper registration may be made upon the proper records and new bonds may be issued to my sisters. And it is distinctly understood that it is the purpose to vest the ownership of said bond in my said sisters from this time, and the only reason for not making the transfer and delivery now to them, is to reserve to myself the enjoyment of the interest as aforesaid. In the event my brother F. M. Robertson shall die before I do, then and in such event my brother T. H. Robertson shall take said bonds and perform all acts and duties and have all the powers herein conferred upon or required of said F. M. Robertson."

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J. J. RAY, and J. H. BANKHEAD, for appellant.—There was no completed gift.—*Williamson v. Yeager*, 34 A. S. R. 200; *Barnham v. Reed*, 136 Ill. 389; *Beaver v. Beaver*, 6 L. R. A. 404 and note; *Holmes v. McDonald*, 75 A. S. R. 432; *Curry v. Powers*, 70 N. Y. 212; *Walker v. Crews*, 73 Ala. 418; 14 A. & E. Ency. of Law, 1015, note 2. There was no delivery of the bonds.—5 L. R. A. 73; 69 Pac. 330; *Sewall v. Glidden*, 1 Ala. 56; *Jones v. Weakley*, 99 Ala. 441. There was no acceptance.—*Arrington v. Arrington*, 122 Ala. 517; *Smith v. Savings Bank*, 10 A. S. R. 402. There was no executed declaration of trust.—*Young v. Young*, 38 Am. Rep. 634; *Williamson v. Yeager*, 34 Am. St. Rep. 203 and note. The court will not enforce as a trust a transaction which was intended as a gift.—*Wade v. Hazelton*, 137 N. Y. 215; *Welch v. Henslaw*, 64 A. S. R. 314; 4 A. & E. Ency. of Law, 1017; *McHugh v. O'Conner*, 91 Ala. 243; *Gillespy v. Bursleson*, 98 Ala. 551. The transaction was testamentary in character.—*Busket v. Hassel*, 107 U. S. 602; *Gilham v. Mustin*, 42 Ala. 366; *Sharpe v. Hall*, 86 Ala. 114; *Crocker v. Smith*, 94 Ala. 298. Being testamentary it was in derogation of the rights of the wife and as such, and also in her representative capacity, she had a right to pursue the bonds wrongfully converted and insist upon their return.—*Cushman v. Thayer*, 32 Am. Rep. 315. Undue influence was exercised and it matters not whether by a beneficiary or an outsider.—27 A. & E. Ency. of Law, 500; *Matter of Cahill*, 74 Cal. 52; *Smith v. Henline*, 174 Ill. 184; *Randolph v. Lampkin*, 90 Ky. 551; *Powell v. Plant*, 23 So. Rep. 399; *Miller v. Simonds*, 72 Mo. 669; *Coghill v. Kennedy*, 119 Ala. 654.

GEORGE A. EVANS, for appellee.—The giver had a right to dispose of his property as he saw fit and the gift in question was complete.—14 A. & E. Ency. of Law, pp. 1014-15 and 1052-3; *Whitten v. McFall*, 122 Ala. 619; *Adair v. Craig*, 135 Ala. 332. The undue influence which suffices for the avoidance of the conveyance is not shown in this case.—*Gilbert v. Gilbert*, 22 Ala. 532; *Taylor v. Kelly*, 31 Ala. 70; *Poole v. Poole*, 35 Ala. 17;

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Hall v. Hall, 38 Ala. 134; *Burney v. Torry*, 100 Ala. 168; *Adams v. Craig*, *supra*. The wife is vested with the right to dower in land but has no interest in the personal property of her husband before his death.

ANDERSON, J.—“A gift of personal property, made with intent that it shall take effect immediately and irrevocably, and fully executed by complete and unconditional delivery, is good and valid as a gift *inter vivos*, although at the time the donor is in extremis, and dies soon after. Moreover, a gift made in anticipation of death, but not conditioned upon that event, is a gift *inter vivos*, and not a gift *causa mortis*.”—14 Am. & Eng. Ency. Law, 1014; *Dresser v. Dresser*, 46 Me. 48; *Gilligan v. Lord*, 51 Conn. 563; *Adair v. Craig*, 135 Ala. 332, 33 South. 902; *Whitten v. McFall*, 122 Ala. 619, 26 South. 131; *Abney v. Moore*, 106 Ala. 131, 18 South. 60; *Gillham v. Mustin*, 42 Ala. 366; *Trawick v. Davis*, 85 Ala. 342, 5 South. 83. The instrument transferring the bonds in the case at bar preserved the interest thereon to the donor for his life, but did not operate as a limitation upon a present transfer of the title, and no power was reserved to the donor to defeat or jeopardize the same.

While such a gift may operate in presenti and be valid and binding, the question that presents itself for our consideration in the case at bar is: Was it binding on the wife, and did the donor, Walter Robertson, have the lawful right to so dispose of his property and thus defeat her marital rights thereto? “It may be stated that at common law the husband, as against every person except his creditor, has a right to dispose of his personality in any manner he thinks proper during his lifetime, and during the coverture the wife has no interest in the property, except so far as the husband may be liable for her support and maintenance. And even in jurisdictions where, by the common law, by custom, or by statute, the wife is entitled to a distributive share in the husband’s personality, it is conceded that the husband has the power to dispose absolutely of his personality during his lifetime by sale or gift; and, if he reserves no

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right to himself, the transfer will prevail against the wife, though made to defeat her claim. But, according to many authorities, if the conveyance or transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive the widow of her distributive share, it will be ineffectual, against her. In other jurisdictions, however, it is held that if the conveyance, whether voluntary or not, be not revocable by the grantor, it is not to be considered as a will in disguise, on the ground that he reserves to himself the possession and control of the property during his life, and it will not be set aside as in fraud of the wife."—15 Am. & Eng. Ency. Law (2d Ed.) 834.

It has been held by a line of decisions that a wife has no vested interest in the personal estate of the husband. *Cameron v. Cameron*, 10 Smedes & M. (Miss.) 394, 48 Am. Dec. 759; *Lightfoot's Ex'rs v. Colgin*, 5 Munf. (Va.) 42; *Stewart v. Stewart*, 5 Conn. 317; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581; *Padfield v. Padfield*, 68 Ill. 210; *Jones v. Somerville*, (Miss.) 28 South. 940, 84 Am. St. Rep. 627. That being the case, the husband can dispose of his personal property as he may see fit, and the wife cannot complain. This court became committed to this doctrine in the case of *Ford v. Ford*, 4 Ala. 142, wherein Justice Ormond, in defining the husband's right to his personalty, says: "He has by law, during his life the most absolute and unqualified dominion over it. The only restriction which has been imposed on him in favor of his wife is in its disposition after his death by will. It is difficult, then, to conceive how a disposition of property, made in the lifetime of the husband, and to take effect immediately, could be fraudulent against the wife, as no right whatever vests in the wife until his death. Her title is derived, not from contract, but is vested in her by law, and has no existence whatever until his death." We see no reason for departing from the doctrine above declared, which has become a rule of property in this state.

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It matters not that the grantor, Walter Robertson, charged the trustee with the payment to him of the interest on the bonds for his life, as it was not a will in disguise. It was an irrevocable disposition of the property conveyed by the assignment, by which the title passed immediately out of the grantor and vested in the respondents. It was therefore not testamentary in its character.—*Ford v. Ford, supra; Jones v. Somerville, supra.* We are of the opinion that the assignment of the bonds was not the result of undue influence on the part of F. H. Robertson.

The decree of the chancellor is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

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Bill to Enjoin the Probate of a Will.

(Decided April 28th, 1906. 41 So. Rep. 771.)

1. *Wills; Contract to Make Will; Enforcement.*—A court of equity will enforce a valid agreement made by a person to dispose of his property by will in a particular way.
2. *Same; Remedies for Breach.*—A valid contract for the disposition of property by will in a particular way, can only be enforced by fastening a trust on the property of the person making the agreement, on testator's death, in favor of the promisee, and enforcing it against the heirs and personal representatives of the testator, or those holding under them, charged with notice of the trust. The will is not set aside, but the executor heir or devisee is made trustee to perform the contract, hence it is necessary that the will be first probated, else it cannot be recognized.
3. *Same.*—A person made a contract to execute a will containing certain provisions and naming certain persons as executors, which contract was performed. Thereafter this will was revoked by the execution of another will containing different provisions, but naming same executors. Held; this fact did

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not give the bill equity, as the contract could not be enforced by setting aside the last will and probating the former, as it was revoked by the execution of the later will, and can be revived only by the expressed intentions of the testator himself. —§§ 4264, 4266, Code 1896.

APPEAL from Mobile Chancery Court.

Heard before HON. THOMAS H. SMITH.

This was a bill filed by Bromberg and others, as executors of the last will and testament of Frederick Johnston, deceased, against Edward P. Allen, the Roman Catholic bishop of Mobile, the Catholic charities, and others, and sought to enjoin the probate of a will purporting to have been the last will and testament of Mary Johnston, wife of Frederick Johnston. The case made by the bill is that Johnston and his wife, both being over 60 years of age, and having no children, no mother and father living, and no near kin, agreed to execute similar wills, leaving their property, which consisted of certain real property and personal property, owned in severalty by each, each having such property in his or her own right, to the other during life of the survivor, and to certain charities, widows and orphans, in the city of Mobile. It alleges the execution of similar wills by each before same witnesses and of same date, the death of Frederick Johnson, and the probate of the original will left by him; the discovery subsequently of another and later will left by him and a similar will made by his wife; that the probate order admitting the first will to probate was annulled, and an order made admitting the latter will of Johnston to probate, naming the present appellees as executors; that the widow filed a dissent from the will under the statute, and received the proceeds of the will while filing dissent; that executors and beneficiaries under Johnston's will compromised with her by giving her absolute property in certain bonds, together with the rents, incomes, and profits arising from the property left by Johnston and she re-executed the will similar to the husband's last admitted to probate; that later she executed another will, leaving her property to other objects than mentioned in the husband's

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will; that she was very old when it was executed, and that its execution was in fraud of orators; that the executors named in the will of the wife were applying to the probate court to probate said last will of Mary Johnston, and unless restrained would do so. There was motion to dismiss bill for want of equity, and to dissolve injunction, which were overruled, and from such decrees this appeal is prosecuted.

SULLIVAN & STALLWORTH, for appellant.—The only rights sought to be defeated are such as are given by the will executed by Mary Johnston in 1905. Until that will is probated no rights or claims exist that can be litigated.—*Ellis v. Davis*, 109 U. S. 485; 4 Mayfield's Dig. p. 1151, § 237, p. 1164, § 522 p. 1171, § 701 and pp. 1172 and 1181. The only theory upon which the bill can be sustained is that Mary Johnston could not revoke her will made in 1902. This is not tenable.—*Jordan v. Jordan*, 65 Ala. 305; *Reid v. Shergold*, 10 Ves. Jr., 370; *Blackburn v. Adams*, Eccl. Rep. 278. Although one may make a binding irrevocable contract to make a certain will, he can revoke the will made in pursuance thereof.—*Anderson v. Egger*, 55 L. R. A. 375; *Johnson v. Hubbell*, 66 Am. Dec. 773. One may revoke a will in several ways.—§ 4165, code 1896; *Baker v. Bell*, 49 Ala. 234. The chancery court had no jurisdiction to direct the probate of any will.—*McCutchen v. Logging*, 109 Ala. 462, nor has it jurisdiction to determine the right of complainants to administer upon the estate of Mary Johnston.—*Ex parte Lunsford*, 117 Ala. 228; *Lunsford v. Lunsford*, 122 Ala. 247. In the event it should appear that Mary Johnson bound herself to make the will executed by her in 1902 her last will, the courts will not set aside such will but will require the executor or devisee to become trustees to perform the contract.—*Bolman v. Overall*, 80 Ala. 451. A contract that will not support an action for the breach thereof cannot be specifically enforced.—*Kent v. Dean*, 128 Ala. 600. A bill in equity seeking the enforcement of the parol trust in real property devised by will is without equity.—*Moore v. Campbell*, 102 Ala. 445.

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FREDERICK G. BROMBERG, for appellee.—The executors as individuals acquired valuable rights under the terms of the agreement which they could insist upon in their capacities as individuals and as executors of the will of the husband.—§ 219, code 1896; *Young v. Hawkins*, 74 Ala. 373; *Bessemer v. Rosenbaum*, 137 Ala. 534. Equity will require the wife to carry out the agreement made with the husband.—*Carmichael v. Carmichael*, 40 N. W. 173; *Truett v. Smith*, 20 Atl. Rep. 279.

The death of one of the parties in such a case carries his part of the contract into execution and the other party may not rescind the contract.—*Dufour v. Pereira*, 1 Dick. 419; 3 Cliff. 169; 20 Fed. Cas. 1033.

DENSON, J.—The bill in this case was filed to enjoin the probate of a will in the probate court of Mobile county, upon the allegation that its execution was in violation of a contract, made between the testatrix, and her husband, to execute similar wills, with the same executors, each in favor of the other for life, with remainder to certain public charities. The bill avers that the contract was performed upon the part of the husband who died first, and that the testatrix, his wife, accepted the benefits therefrom. It further avers that the testatrix in 1902 made a will in conformity with her contract with her husband, but in 1905 had executed the will containing different dispositions, the probate of which is opposed. The persons named as executors in the will of 1905, and the beneficiaries therein, are made parties defendant. The injunction prayed for in the bill was granted. This appeal is from the refusal to dissolve the injunction and to dismiss the bill for want of equity.

It cannot be doubted that a person may make a valid agreement to dispose of his property by will in a particular way, and that a court of equity will require its performance.—*Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107. In the case cited it is said: "It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy; for this can be done only in the lifetime of the testator, and

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no breach of the agreement can be assumed as long as he lives, and after death he is no longer capable of doing the thing agreed by him. But the theory on which the courts proceed is to construe such agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisees, and to enforce such trust against the heirs and personal representatives of the deceased or others holding under them charged with notice of the trust. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract."

As a contract for the execution of a will with particular provisions can be specifically enforced only by fastening a trust on the property of the testator in favor of the promisee and enforcing such trust against the personal representatives and others claiming under the will violating the terms of the contract, it is necessary that the will be first probated, "for it cannot be recognized in any forum until admitted to probate."—*Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501. Nor does the fact that the agreement embraced the appointment of the same executors in both wills give equity to the bill. As stated, no breach of the agreement in any of its parts can be assumed as long as the testator lives, and after his death he is no longer capable of doing the thing agreed upon. Such agreement could be specifically enforced only by setting aside the latter will and probating the former. This could not be done. A will is in its very nature ambulatory, subject to revocation during the life of him who signed it, and is revoked by the execution of another will.—Code 1896, § 4264. After such revocation it can be revived only by the expressed intention of the testator himself.—Code 1896, § 4266.

For the reasons above given, a decree will be here rendered dissolving the injunction and dismissing the bill for want of equity.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

[Gibson v. Wallace.]

Gibson v. Wallace.*Bill to Foreclose Mortgage.*

(Decided June 30th, 1906. 41 So. Rep. 960.)

1. *Husband and Wife; Suretyship of Wife; Burden of Proof.*—The burden is on the wife to show that the debt, evidenced by a note and mortgage signed by both husband and wife, was that of the husband merely, and that she executed the same only as his surety.
2. *Evidence; Parol Evidence; Principal and Surety.*—Parol evidence is admissible to show that the wife signed as surety only a note and mortgage executed by the husband and wife.
3. *Husband and Wife; Agency of Husband.*—The lender knew that the husband was the general agent of the wife; he declared that he would not make a loan to the husband, but that if he would get his wife to give a mortgage on her land, he would let the husband have the money. Held, should be construed to mean that the lender would let the husband have the money "for the wife."
4. *Same; Evidence.*—The evidence in this case examined and held to show that the wife was the principal debtor and not merely surety for the husband.

APPEAL from Lawrence Chancery Court.

Heard before HON. W. H. SIMPSON.

This was a bill filed by W. K. Wallace to foreclose a mortgage executed to him by E. R. Gibson, a married woman. The facts are sufficiently stated in the opinion of the court. From a decree granting the relief prayed this appeal is prosecuted.

W. T. LOWE, and KIRK, CARMICHAEL & RATHER, for appellant.—If the debt secured by the note and mortgage was that of the husband the wife's property cannot be sold to pay it, although she executed the mortgage.—§ 2529, code 1896; *Continental Bank v. Clark*, 117 Ala. 292; *Richardson v. Stephens*, 114 Ala. 238. If the appellant executed the mortgage under duress of the husband, and appellee knew this, the mortgage is invalid.—

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Noble v. Moses, 81 Ala. 530; *Moses v. Dade*, 58 Ala. 211; *Rogers v. Adams*, 66 Ala. 600; *Walker v. Nicrosi*, 135 Ala. 354.

It may be shown by parol evidence that the wife signed as security for the husband.—*Compton v. Smith*, 120 Ala. 233; *Howle v. Edwards*, 113 Ala. 187; *Continental Bank v. Clark*, *supra*. The fact that the wife's name appears first on the note does not make it her debt.—*Continental Bank v. Clark*, *supra*; *Richardson v. Stephenson*, *supra*. The acknowledgement can be impeached by showing fraud and undue influence.—*Grider v. A. F. L. N. Co.*, 99 Ala. 284; *Moses v. Dade*, *supra*.

D. C. ALMON, for appellee.—If appellee did not participate in or know of, or induce or was privy to the alleged undue influence in this case, it could not affect his rights.—*Walker v. Nicrosi*, 135 Ala. 353; *Pratt L. & I. Co. v. McClain*, *Ib.* 452. The acknowledgement is supposed to speak the truth.—*American Co. v. James*, 105 Ala. 347. In the absence of fraud or duress a certificate of acknowledgement valid on its face cannot be impeached by parol evidence.—*Grider v. American Mtg. Co.*, 99 Ala. 281; *American Mtg. Co. v. Thornton*, 108 Ala. 268. The burden of proving that it was not appellant's debt was upon her.—*Mohr v. Griffin*, 34 So. Rep. 378.

WEAKLEY, C. J.—The bill was filed by W. K. Wallace against E. R. Gibson, a married woman, to foreclose a mortgage executed by her with the consent and concurrence of her husband upon her property. The mortgage recites that she was indebted to the mortgagee in a certain sum, evidenced by a described instrument of even date, and this instrument, which is exhibited with the bill, is the note of both husband and wife, her signature being first written.

The defenses are two in number: First, that she executed the mortgage under the duress of the husband, of which the mortgagee had knowledge; and second, that she had signed the note and mortgage as surety of the husband merely. The chancellor, on the evidence, was of opinion she had failed to establish either defense, and

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decreed foreclosure for the amount of the note, less a small credit, and attorney's fees. While there is evidence of general mistreatment of the wife by the husband, we are not reasonably satisfied that she executed the mortgage under his coercion or duress; and if she did, there is want of sufficient evidence that the mortgagee either participated in or was cognizant of it.—*Walker v. Nicrosi*, 135 Ala. 353, 33 South. 161; *Mohr v. Griffin*, 137 Ala. 456, 34 South. 378. The burden of proof rests upon the wife to show that the debt was that of the husband merely and that she executed the instruments (the note and mortgage) as his surety.—*Mohr v. Griffin*, 137 Ala. 456, 34 South. 378; *Lunsford v. Harrison*, 131 Ala. 263, 31 South. 24. The note and mortgage, *prima facie*, constitute an indebtedness of her own, although parol evidence is admissible to establish her suretyship if it in reality existed. Many cases of the same general nature as this have been presented to and decided by this court. The law is settled beyond further controversy and the result usually turns upon the facts. No two cases are exactly alike, and hence, other decisions on different facts and circumstances are of little assistance, in reaching a correct conclusion in new cases as they arise. The question at last is whether, notwithstanding the form of the transaction, the wife was attempting to secure a debt entirely her husband's upon which she was not bound either separately or jointly. We have given the evidence careful examination. It lies within a small compass, and it has not been difficult to secure full consideration thereof by each of the judges who participate in this decision.

The consideration of the note, secured by the mortgage of January 18, 1896, now sought to be foreclosed, was the surrender and cancellation of two other notes, and mortgages of an earlier date, in like manner duly executed by the wife to the same mortgagee, her husband joining therein, as required by the statute, to constitute a valid conveyance. Attention must, therefore, be directed to the two previous transactions. At the outset, an important fact, established by the undisputed evidence, and in the light of which the transactions, and

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the testimony of the two parties must be interpreted should be noted. The wife owned the farm, agricultural implements, and live stock; the husband owned nothing, and this fact was known to Wallace. In 1904 a stock of plantation supplies was purchased by the husband from the proceeds of cotton grown on the wife's land, and with this he conducted, in her name, a small store. She gave no personal attention to her business affairs, their management was confided solely to the husband. According to her evidence, he superintended the making of the crops, bought all the supplies that were not raised at home, and superintended the gathering and selling of the crops. Furthermore, she was accustomed to sign notes and mortgages on her property, without question, when requested by the husband, and the money obtained upon them was delivered to him, and, as we may well presume, for use in employing laborers, purchasing supplies, including corn when needed, paying taxes, and otherwise meeting the demands of her mercantile and planting operations. In fact, the evidence establishes the use in this way of a portion of the money borrowed upon each of the previous mortgages. The death of the husband, before this bill was filed, prevented any evidence as to what was done with the remainder. This, however, is not important; under repeated decisions of this court, it is no concern of the lender to the wife that she gives the money to her husband or places it in his hands for disbursement.

We will now consider the evidence as to each of the previous mortgages, cancellation of which formed the consideration of the instrument directly involved in this case. In respect of the mortgage of March 2, 1894, there is little room for controversy. Although there is no doubt of the fact that the husband, in the exercise of his authorized general superintendence of the wife's affairs, arranged the preliminaries, and induced the mortgagee to bring the money to their farmhouse together with a prepared mortgage ready for execution, yet she well understood the loan was made to her, and she admits the money was placed in her hands, with the statement that it was hers. The circumstances attending the mortgage

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of January 18, 1889, in their general outline, are satisfactorily shown, without material conflict. The note and mortgage were prepared by the husband at their home, some miles from the residence of the mortgagee, duly executed there before a justice of the peace, and sent to the mortgagee by a farm laborer to whom the money was delivered, and who, after paying out of it the taxes of the wife and her son, carried the balance to the home of the grantors in the mortgage. The evidence conflicts upon the inquiry whether the money was handed to the husband or the wife by the messenger, but, as above stated, this is not important, if other evidence proves a loan to her.

This leaves for consideration a paragraph in the deposition of Wallace, upon which the appellant strongly relies to establish the contention that the loan of 1889 was made to the husband alone. We quote it literally: "Mrs. Gibson did not apply to me in 1888 to loan her \$270 or any other amount. In 1888 Jim Gibson was up here and wanted to borrow some money. I told him I could not loan it to him as he had nothing to secure it with. But if he could get his wife to give a mortgage on the land that I would let him have the money. He went away and the next thing I knew about it Crow came up with the mortgage signed up and got the money. That is the mortgage dated January 18, 1889 with which Crow also brought a letter from Gibson and Mrs. Gibson and got the money." The letter which is produced, signed by both, requested that the money be sent them for the note and mortgage by the bearer Crow, and thereupon, contemporaneously with the delivery of the instruments, purporting to bind her and her land, the money was confided to their authorized agent as requested by both.--*Lunsford v. Harrison*, 131 Ala. 263, 31 South. 24. In the light of the general agency of the husband, and the declaration of the mortgagee that he would not make a loan to the husband, we interpret the mortgagee's statement to mean that he would let him have the money for the wife, and as her representative, and upon the faith of a valid security; and this interpretation is supported by what followed in the preparation and delivery

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of the mortgage, the writing of the letter to the mortgagee and the use of the money, at least in part. Other considerations might be stated lending support to our conclusion, but they would unduly prolong the opinion.

We have considered the legal evidence only and all the legal evidence found in the record; there is no occasion to review the rulings of the chancellor, admitting or excluding parts of the testimony.

The decree was correct and will be here affirmed.
Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

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Bill for Receiver.

(Decided April 20th, 1906. 40 So. Rep. 667.)

1. *Corporations; Voluntary Dissolution; Directors as Trustees.*—The dissolution of a Florida corporation under a decree of the Florida court, made upon application of a majority of the stockholders, is a voluntary dissolution under § 2157, Rev. Stat. of Fla., and under such section, upon a voluntary dissolution, its then president and board of directors become the trustees of its assets and powers, with authority and power to wind up its affairs.
2. *Same.*—When a corporation of the State of Florida has been dissolved by the courts of that state on the application of a majority of its stockholders, and its affairs has passed into the hands of its then board of directors, a stockholder participating in the dissolution proceedings may not apply to an Alabama court for the appointment of a receiver of the corporation upon the allegation that the ultimate dividends from its assets when distributed would be lessened by the wrongful management of its trustees, although all its property may be situated in this State.
3. *Same; Appointment of Receiver; Allegations and Proof.*—To justify the appointment of a receiver the allegations and the proof in support of them must be clear and positive.

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APPEAL from Mobile Chancery Court.

Heard before Hon. THOS. H. SMITH.

Bill by John W. Black against the Sullivan Timber Company and others. From a decree annulling the appointment of a receiver of defendant company, and overruling a motion for the appointment of a receiver plaintiff appeals. The facts are sufficiently set out in the opinion of the court.

L. H. & E. W. FAITH, for appellant.—Upon appeal from the register to the chancellor the trial is de novo and amendments to the bill are to be considered.—*Moritz v. Miller*, 87 Ala. 332; *Smith v. Teague*, 119 Ala. 300. It seems under the statute law of Florida, where the dissolution took place, that upon a voluntary dissolution of a corporation created under the laws of that State the president and directors are constituted trustees for the corporation and for the management of its properties. It is exactly contrary in Alabama.—Sec. 1291, Code 1896; *Florence Gas Co. v. Handy*, 101 Ala. 15; *Weatherly v. Capital City W. W. Co.*, 115 Ala. 156. The Florida law has no extra territorial operation and the trustees of the Florida corporation would have no right to administer the property of the corporation located in Alabama.—*Booth v. Clark*, 17 How. 322; *Reynolds v. Stockton*, 140 U. S. 271; *Pendleton v. Russell*, 144 U. S. 640. Nor will a foreign receiver be permitted against the claims of creditors residing in that place to remove from that State assets of the debtor.—Beech on Receivers, Sec. 254; *Smith v. Godfrey*, 61 Am. Dec. 617 and note; *Mahorner v. Hooc*, 48 Am. Dec. 706. In other words the Alabama statutes control and the Florida statutes have no application.—*Sturgis v. Vanderbilt*, 73 N. Y. 284; *McLean v. Hardin*, 3 Jones' Eq. 294; *Smith v. Godfrey*, *supra*; *Seay v. Palmer*, 93 Ala. 381. All the trustees must act jointly.—*Suggs v. Driver*, 31 Ala. 286; *Tarrer v. Haines*, 55 Ala. 503; *Robinson v. Allison*, 74 Ala. 254; *Wellborn v. Austin*, 77 Ala. 384. Appellant is entitled to relief for the further reason that a majority of the trustees have breached the trust in agreeing to sell part of the property at private sale.—

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Bacon v. Robertson, 18 How. 480; *Lum v. Robertson*, 6 Wall. 277; *Etheringham v. Clark*, 21 So. Rep. 547; *Lee v. Lee*, 55 Ala. 600; *Calhoun v. King*, 5 Ala. 523. There is discord and dissention among the trustees to such an extent that they do not and will not act jointly in executing the trust which furnishes good ground for equitable interposition.—*McPherson v. Cox*, 96 U. S. 404; *Wilson v. Wilson*, 14 N. E. 521.

STEPHENS & LYONS, and BLOUNT & BLOUNT, for appellees. This is a proceeding by a minority stockholder dissatisfied with the management of the majority and of the managers selected by them. In such a case a receiver will not be appointed or even a bill entertained.—*Ranger v. Champion*, 18 How. 331; *City Pottery Co. v. Yates*, 37 N. J. Eq., 545. The board of directors was selected by the stockholders for this particular end and in the absence of dishonesty or fraud, or gross mismanagement should not be displaced.—*Follet v. Fields*, 30 La. Ann. 161; *Etowah Mining Co. v. Wills Valley*, 106 Ala. 492. The trust is a continuing one in this instance and hence receiver will not be appointed.—106 Ala. 492. These trustees are directors continued and as such cannot be displaced under the allegations of the bill.—*Bridgeport v. Tritsch*, 110 Ala. 274; *Roman v. Woolfolk*, 98 Ala. 219. The appellant in this case contracted with reference to the laws of Florida and is bound by them.—103 U. S. 225. A receiver will not be appointed if there is any other adequate remedy.—114 Ala. 65; *Briarfield v. Foster*, 54 Ala. 622. Remedy by injunction against isolation complained of.—*Briarfield v. Foster*, *supra*.

HARALSON, J.—This bill was filed by the appellant, John W. Black, against the Sullivan Timber Company and several stockholders of the same, seeking the appointment of a receiver of the defendant company, a Florida corporation, but having all its property in Alabama. Upon the filing of the bill the the register appointed the complainant, as such receiver, without notice to the appellees. The order of the register, making the appointment, was appealed from, and upon such ap-

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peal, the chancellor reversed and annulled the same, and also overruled and denied a motion, then made before him, for the appointment of a receiver. This appeal is prosecuted to reverse that decree of the chancellor.

Before the institution of this suit, April 1st, 1905, the circuit court of Escambia county, Florida, rendered a decree at the request of a majority of the stockholders,—the complainant himself, being one of the stockholders, joining in the petition for such dissolution,—dissolving said corporation. All the defendants except the Sullivan Timber Company, together with the complainant, were the directors of said corporation, at the time the decree of the said Florida court was rendered.

Section 2155 of the Revised Statutes of Florida of 1892 provides, "All corporations shall continue bodies corporate for the term of three years after the time of dissolution from any cause, for the purpose of prosecuting or defending suits by or against them and enabling them to gradually settle their concerns, to dispose of and convey their property, and to divide their capital stock, but for no other purpose."

By section 2157 of said statutes, it is provided, "Upon the voluntary dissolution of any corporation already created, or which may hereafter be created, by the laws of this state, the president and directors, at the time of its dissolution, shall be trustees of such corporation, with full power to settle its affairs, collect its outstanding debts, and divide the money and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them; they may sue for and recover such debts and property by (in) the name of the trustee of such corporation, and may also be sued by the same, and such trustee shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands, but in the event of dissolution from any other cause a petition may be filed in the circuit court by any three or more creditors or stockholders of said corporation, praying that a receiver be appointed, and the court or judge

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thereof at chambers, shall hear and consider said petition, and for just and reasonable grounds shall grant said petition and appoint a receiver, and unless the president and directors of such corporation shall swear that the corporation is solvent and exhibit proof of the same satisfactory to the court or judge, such petition shall be granted and a receiver be appointed, but no voluntary dissolution shall be made or permitted after the institution of any suit or proceeding against any corporation for an involuntary or forced dissolution."

The petition for dissolution of the corporation was asked, as stated, by a majority of the stockholders including complainant, in all respects as provided by the statute of Florida, and that it was a voluntary dissolution, cannot be questioned.

In Alabama we have kindred statutes.—Code 1896, §§ 1291-1300. The dissolution is to be decreed by the court of chancery. Section 1293. Upon a decree of dissolution, a receiver is to be appointed, of all the assets and property of the corporation, and the chancellor shall direct him to collect, by suit or otherwise, all the debts due the corporation, and sell property real or personal, belonging to the corporation, and how he shall make the title thereto to the purchaser, etc. Section 1294.

Section 1298 provides: "All corporations whose powers expire by limitation, all which are dissolved by forfeiture or any other cause, exist as bodies corporate for the term of five years after such dissolution, for the purpose of prosecuting or defending suits, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their business."

Upon the dissolution of any corporation, unless other persons are appointed by the general assembly, or by a court of competent authority, the managers of the business of the corporation at the time of its dissolution, by whatever name known, are the trustees of the stockholders and creditors, authorized to settle the affairs of the corporation, dispose of such property as is necessary to pay its debts, and divide among the stockholders the money and property remaining after payment of such debts and the necessary expenses."—Section 1299.

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"Such persons have authority to sue for and recover the debts and property of the dissolved corporation, in its corporate name, and are jointly and severally responsible to its creditors to the extent of the property which may come into their hands." Section 1300.

The statutes of the two states are so nearly alike, that the proper construction of those of one state, applies alike to those of the other. In the case of *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 22 South. 140, we had under consideration the construction of sections 1690 and 1691 of the Code of 1886, which appear also in the Code of 1896 as sections 1298 and 1299, where it was said, as the conclusion of the court: "Upon dissolution, the corporation is essentially dead except for the general purpose of collecting its assets, paying its debts and dividing its property and money remaining after the satisfaction of its liabilities among its stockholders. For the purpose of the enterprise or business which it was chartered to carry on, it is as essentially dead as if we had no statute continuing its life for the other specified purposes, as if, indeed, it had never existed at all; and this by the words of the statute which declare it to be non-existent for the purpose of carrying on its business.—(Code 1886, § 1690 (Code 1896, § 1298.)) Suits may be brought by its trustee and against it in its corporate name, but such suits only as pertain or are necessary or incident to the settlement of its affairs as of a business which absolutely ceased on the instant of its dissolution. The corporation as such has no more concern with or interest in the property once owned by it after dissolution than a dead man has in the estate he owned at the moment of death. The property after dissolution is in equity the property of the shareholders charged with the payment of debts, and by the statute committed to certain trustees to satisfy this charge and divide the residue among such shareholders. The trustees are invested with the legal title for the purpose of the trust and to an extent sufficient thereto, but no further. Contracts within corporate competency and of a nature to continue after dissolution and bind the property, are not abrogated by dissolution, but are of con-

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tinuing efficacy against the successors to the defunct corporation in ownership of its property, assets and franchises," etc.—*Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375.

It is an admitted principle that the laws of another state have not, *proprio vigore*, any binding force extra territorium, but effect is given to such laws in a state foreign to the one making them, when by change of domicile, or removal of property into another state, on the principle of comity of nations, provided they do not contravene good morals, or are not repugnant to the policy or positive institutions of the state.—*Hanrick v. Andrews*, 9 Port. 25; *Castleman v. Jeffries*, 60 Ala. 389; *High on Receivers*, § 254.

It would seem, therefore, that the directors of the corporation, at the time of the dissolution of the corporation, who, by statute in the state of Florida were constituted trustees to wind up its affairs, will be recognized as such trustees in this state unless such appointment, and the conduct of the trustees, contravenes the policy and laws of this state. This will hereafter more fully appear.

Mr. High, speaking of foreign corporations and their dissolution, says: "When an association incorporated in a foreign country, has been dissolved by a decree or order of the government of that country, but the decree of dissolution is not absolute, and still leaves the corporation in existence for certain specific purposes, and it has property within the limits of this country under control of its officers resident here, the courts of this country will not appoint a receiver of the assets here, upon grounds which would not have availed for that purpose in the foreign country."—*High on Receivers*, § 305, citing *Hamilton v. Accessory T. Co.*, 26 Barb. 46; *Murray v. Vanderbilt*, 39 Barb. 140.

In *First National Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 328, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, the principle is declared as elementary that, "When a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all the laws of the

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state under which the corporation is organized, and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution," etc.

In *Relfe v. Rundel*, 103 U. S. 225, 26 L. Ed. 337, the doctrine is stated that, "No state need allow the corporations of another state to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but any person who deals with it everywhere, is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."—*Rundel v. Life Association of America* (C. C.) 10 Fed. 721; *R. M. S. Mines v. Brown*, 58 Fed. 647, 7 C. A. 412, 24 L. R. A. 776; *Fitts v. N. L. Association*, 130 Ala. 416, 30 South. 374.

The complainant, on the two grounds of being a creditor of the corporation, and also of being a shareholder, on either or both of which, bases his right, in the allegation of his bill, to have a receiver appointed. There is no allegation that the corporation is insolvent, and the proof shows that it is not. As a creditor, therefore, he does not show that he is in peril unless by reason of the averments as to the management of the affairs of the corporation, he is in danger of losing his debt. His right as a shareholder for a receiver must be, if at all, because his ultimate dividends from the distribution of the assets of the corporation will be lessened by the wrongful management of the defendants. Our inquiry may, therefore, be confined to this latter theory, which necessarily includes the first.

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Cook on Corporations, § 746, states the rule to be, that a court of equity will not practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage its corporate affairs. He says, "A court will not appoint a receiver, because some of the shareholders disapprove of the management."—*Id.* No. 3; *Edison v. Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195.

"A receiver will not be appointed at the instance of a stockholder, even though mis-management is charged, there being no fraud, and no danger of insolvency."—*Id.*

"A minority of the stockholders of a corporation are not entitled to a receiver because of dissatisfaction with the policy and management of the majority of the officers and directors, in the absence of any showing of fraud or of insolvency."—*High on Receivers*, § 295.

In *Ranger v. Champion C. Press* (C. C.) 52 Fed. 614, the court held that, "there are three classes of cases in which stockholders may complain. A minority may object to the business policy pursued as tending to injure, perhaps destroy their interest. In such cases the court will seldom or never interfere. The majority must govern, unless there be palpable abuse of power or an interference with vested rights."—*Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401.

As has appeared, complainant was a director of said corporation at the time of its dissolution, and participated in the application to the Florida court to dissolve the same. He thus assented to the laws of the state of its creation of the corporation which upon being dissolved, control the settlement of its affairs. He assented, that the officers by whom, and the place and manner, shall be such as the laws of the state of Florida prescribe, and cannot, therefore, now ask the court, to protect him in the exercise of a right which he expressly relinquished.—*Rundel v. L. Association of America*, *supra*; *Parsons v. Charter Oak Co.* (C. C.) 31 Fed. 305; *Relfe v. Rundel*, *supra*.

It may be, without more, that the facts stated in the bill, would be sufficient on which to appoint a receiver in this state. But the answer under oath denies the ma-

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terial averments of the bill, on which this contention rests.

Numerous affidavits were introduced on each side, those on one hand, to support the averments of the bill, and those on the other, to support the averments of the answer. It is sufficient to say,—having regard to the rule that the allegations and proofs to justify the appointment of a receiver, must be clear and positive—that these averments and proof do not make out a case for the appointment of one.—*Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4.

The chancellor so ruled, and we have not been so convinced that he erred, as to justify the setting aside of his decree. We deem it unnecessary to consider other questions raised and discussed.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

Fuller, *et al.*, v. Varnum.

Bill to Redeem Lands from Foreclosure Sale.

(Decided July 6th, 1906. 41 So. Rep. 777.)

1. *Mortgages; Foreclosure; Redemption; Bill.*—The bill avers that the mortgage which was foreclosed was given to secure an indebtedness of \$174.25, on which there was a credit; a sale under foreclosure and purchase of lands for \$200; a tender to the proper parties of \$249.00 for the purpose of redemption. Held, not subject to dismissal for failure to allege a tender of the purchase money, 10 per cent, etc.
2. *Same; Possession.*—The bill alleges that the lands mortgaged was the homestead of complainant's father, who died in possession thereof the same year of the foreclosure; that it was all the land owned by the parent, and did not exceed 160 acres in area, or \$2,000 in value, and that the parent owned less than \$1,000 worth of personal property; that the parent left a widow and seven minor children, of whom complainant

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was one, Held, the bill was not subject to motion to dismiss for failure to allege who was in possession of the land at the time of foreclosure, or of the filing of the bill.

3. *Same; Surrender of Possession.*—Until demand has been made by the purchaser, or his vendee, for possession of the land sold under the mortgage no duty rests upon one in possession to surrender, as a condition precedent to such a one's right to redeem.

APPEAL from Houston Chancery Court.

Heard before Hon. W. L. PARKS.

Bill by M. T. Varnum against Charles E. Fuller and others. From a decree sustaining defendant's demurrer to the bill, but overruling their motion to dismiss for want of equity, they appeal.

This was a bill seeking to redeem certain lands described therein from foreclosure sale under the power contained in a mortgage executed by W. J. Varnum to J. S. Koonce. The allegations of the bill are, briefly, that W. J. Varnum executed a mortgage to Koonce on certain lands to secure an indebtedness of \$174.25; the transfer of the mortgage by Koonce's heirs to Newton, and a transfer from Newton to Joe Baker; that some time in the year 1903 Varnum died, leaving surviving him a widow and seven children, including complainant, all of whom at that time were under the age of 21 years; that at the time of his death Varnum was in possession of this land, occupying it as a homestead, and that it did not exceed in area 160 acres, nor in value \$2,000; that on November 28, 1903, Joe Baker sold the lands under the terms and powers of the mortgage at and for the sum of \$200 to one J. F. Cochran, executing to said Cochran a deed to said land in the name of the mortgagors under the power in the mortgage; that in December, 1903, Cochran conveyed the lands to complainant's mother, and that before the filing of this bill complainant's mother executed and delivered a conveyance to respondents herein; that by reason of orator being one of the minor children of said Varnum at the time of his death, and the fact that said Varnum resided upon said land as his homestead, and that said land did not

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exceed 160 acres in area and \$2,000 in value, and that said Varnum owned less than \$1,000 worth of personal property at the time of his death, orator became and is the owner or tenant in common of the equity of redemption in said land. The bill alleges that no demand was ever made for possession, and that complainant has tendered to the proper parties the sum of \$249 for the purpose of redeeming said land, which tender has been declined. The respondents moved to dismiss the bill, and demurred to it: Because it does not appear that surrender was made of the land on demand and within 10 days thereafter; it does not aver that the complainant had paid into court the entire purchase price, with 10 per cent. interest per annum, and all other lawful charges, nor does it aver that the complainant is ready and willing to abide by the decree of the court; complainant does not offer to do it; it appears from the allegations of the bill that the complainant is not entitled to redeem from respondents the entire interest in or title to the lands.

R. D. CRAWFORD, for appellant.—Counsel discusses motion to dismiss but cites no authority.

ESPY & FARMER, for appellee.—No brief came to the Reporter.

TYSON, J.—This appeal is by the respondents from a decree sustaining their demurrer to the bill of complaint, but overruling their motion to dismiss it for want of equity.

It is first insisted that the motion should have been granted because the bill fails to aver that complainant tendered the purchase price paid at foreclosure sale, with 10 per cent. thereon; that it only avers a tender of \$249, the price paid at said sale. In a previous paragraph, however, it is averred that only \$200 was the purchase price paid at the foreclosure sale. The note and mortgage showing the amount of the mortgage debt is made an exhibit to the bill, and shows a credit thereon.

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It is apparent from this showing that the averments of the bill may be amended so as to show that the amount tendered, to-wit, \$249, included all lawful charges known to complainant at the date of the tender. If any taxes were paid by the purchasers, they could be also shown by an amendment to be included in the \$249.

The other insistence, predicated upon the failure of the bill to show who was in possession of the land at the date of foreclosure or the filing of the bill, is also without merit. It is shown that complainant was one of the minor children at the date of the death of his father, the mortgagor, and that his father was residing upon the land at the date of his death, which occurred during the year the foreclosure sale was had; that it was his homestead and comprised all the lands owned by him. It is true it is not averred upon what day during the year 1903 the father died. His death may have occurred after the foreclosure, and if it did this would show that complainant was in possession with his mother and the other children of the land; and, as against the motion, we would be, perhaps, authorized to so hold. But, be this as it may, if this be a defect, it is such an one as may be cured by amendment; and clearly, if complainant was in possession of the land at the date of the foreclosure, there was no duty upon him to surrender that possession as a condition precedent to redemption unless a demand was made upon him to do so by the purchaser or his vendee. Section 3506 of the Code of 1896. The motion was properly overruled.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.

[Hayes v. Jasper Land Co., et al.]

Hayes v. Jasper Land Co., et al.*Bill for an Accounting and for Receiver.*

(Decided June 30th, 1906. 41 So. Rep. 909.)

1. *Receivers; Appointment; Sequestration.*—The power to appoint a receiver and sequester property should be exercised with caution, and only where it appears that plaintiff will sustain irreparable loss without it.
2. *Same; Appointment Before Decree on Merits.*—To justify the appointment of a receiver *in limine*, before decree on merits, it should appear that there is reasonable probability of obtaining the general relief sought, and that the property, the subject of the suit, is in imminent danger.
3. *Same; Other Remedies.*—If any other remedy will afford adequate protection to the applicant, a receiver should not be appointed at any stage of the proceedings.
4. *Same; Corporation; Directors and Officers Misappropriating Assets.*—The fact that the directors and officers of a corporation are fraudulently misappropriating its assets will not alone constitute grounds for the appointment of a receiver. If they are solvent, complainant has an adequate remedy.
5. *Same.*—The remedy by accounting being adequate, the fact that the president of a corporation acquired a majority of its stock with corporate funds, in violation of his trust as such president, would not authorize the appointment of a receiver at the instance of a minority stockholder; for the corporation has an option to hold him to an accounting or to ratify his acts and claim the shares so purchased.

APPEAL from Walker Chancery Court.

Heard before Hon. A. H. BENNERS.

LONDON & LONDON, for appellant.—No demand on the board of directors or stockholders was necessary under the facts alleged.—*Montgomery Traction Co. v. Harmon*, 140 Ala. 585; *Montgomery Light Co. v. Lahey*, 121 Ala. 131.

Payment of the money taken or giving security therefor is no answer to the demand for a receiver.—*Morris*

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v. Elyton Land Co., 125 Ala. 26. Verification of the answer by Musgrove is wholly insufficient and of no probative value.—*Burgess v. Martin*, 111 Ala. 656; *McKissick v. Voorhees*, 119 Ala. 101; *Schlisser v. Brock*, 124 Ala. 626; *Heihans v. Coke*, 134 Ala. 223; *Guiton v. Terrel*, 132 Ala. 66; *Pollard v. Southern Fert. Co.*, 122 Ala. 409. Notice of meeting of stockholders was necessary.—Sec. 1280, Code 1896; 10 Cyc. 323; 2 Cook on Corporations, Sec. 595. Dividends cannot be declared from the capital stock.—2 Cook on Corporations, Sec. 548. The capital stock can only be reduced in the manner prescribed by statute.—Acts 1903, p. 335; *Granger L. Ins. Co. v. Kemper*, 73 Ala. 325; 1 Thomp. Corp. Sec. 2114. Notice of the stockholder is not material and burden on the defendant.—*Cobb v. Lagard*, 129 Ala. 488. The stock register is evidence of who are stockholders. Secs. 1261 and 1263, Code 1896. Under the statute the person in whose name the stock is registered is the owner.—*Winter v. Montgomery County*, 89 Ala. 544; *White v. Rankin*, 90 Ala. 541; *Wetumpka v. Kidd*, 124 Ala. 242. The answer is evidence when responsive direct and clear.—*Hartley v. Matthews*, 96 Ala. 224; *Mabel M. Co. v. Pearson*, 121 Ala. 567. As to new or irresponsible matter it is not evidence.—Cases supra; *Bolling v. Roman*, 95 Ala. 518; 105 Ala. 607; 96 Ala. 498. General denials are not sufficient.—*Henry v. Watson*, 109 Ala. 335. Literal denials are also insufficient.—*Henry v. Watson*, supra. Material matters within the knowledge of the defendant which are not denied must be considered as admitted.—*Grady v. Robertson*, 28 Ala. 289; *Smilie v. Siler*, 35 Ala. 88.

E. H. CABANISS and DAVIS & FITE, for appellee.—Power to appoint a receiver and sequester property will be exercised with great caution. There can be resort to this remedy only in extreme cases.—Alderson on Receivers, Sec. 49; *Randell v. Carter*, 62 Ala. 95; *Fort Payne F. Co. v. Iron Co.*, 96 Ala. 472; *Ensley Development Co. v. Powell*, 147 Ala. 300; *Gilbreath v. Union Bank*, 121 Ala. 204; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 634; *Roman v. Woolfolk*, 98 Ala. 234.

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To justify the appointment of a receiver *in limine*, before the decree upon the merits of the bill, two grounds must appear: (a) a reasonable probability that the complainant will succeed ultimately in obtaining the general relief sought; (b) imminent danger to the property, the subject of the suit.—3 Pomeroy's Equity Jurisprudence, (2d Ed). 1331; *Ashurst v. Lehman*, 86 Ala. 370; *Bank of Florence v. U. S. Sav. & Loan Co.*, 104 Ala. 297; *Warren v. Pitts*, 114 Ala. 69; *Pollard v. Fertilizer Co.*, 122 Ala. 413.

A receiver should not be appointed at any stage of the proceedings, if any other remedy will afford adequate protection to the party applying.—*Thompson v. Tower Mfg. Co.*, 87 Ala. 733; *Word v. Word*, 90 Ala. 86; *Pearce v. Jennings*, 94 Ala. 524; *Etowah Min. Co. v. Min. Co.*, 106 Ala. 497; *Bridgeport Dev. Co. v. Tritsch*, 110 Ala. 274; *Roman v. Woolfolk*, 98 Ala. 219; S. C. 13 Sou. 212.

As a corollary to the above rules, it is held, that the mere fact that the directors and officers of a corporation are fraudulently misappropriating the assets of the corporation, constitutes no ground for the appointment of a receiver. If they are solvent, they can be brought to an accounting, which will afford entire relief, and is, therefore, an adequate remedy.—*Briarfield Iron Works v. Foster*, 54 Ala. 622; *Ala. Coal & Coke Co. v. Shackelford*, 137 Ala. 224; *Donald v. Manufacturers' Export Co.*, (Ala.) 38 Sou. 841; *Marcuse v. Gullett Gin Co.*, (La.) 27 Sou. 846; *Edwards v. Bay State Gas Co.*, 91 Fed. 942.

DOWDELL, J.—The bill in this case is by a minority stockholder, and in which the corporation and its president are made respondents. The purpose of the bill is to require an accounting by the respondent Musgrove, the president of the corporation, for certain alleged dealings and transactions by him as such officer, and the bill also prays for the appointment of a receiver for the respondent corporation, and is accompanied by a petition to the chancellor for such appointment. On the hearing of this petition the chancellor refused to ap-

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point a receiver, and it is from this order refusing to appoint that the present appeal is prosecuted.

The equity of the bill, and the right of the complainant as a minority stockholder to file the same, are questions that we need not consider. The chancellor, in his opinion accompanying the decree, upheld the equity in the bill, and there is no contention by counsel for appellees that the ruling of the chancellor in denying the petition for a receiver should be here considered with reference to these questions, but solely with reference to the question of any necessity for a receivership, on the facts as presented by the petition, bill, answer, and affidavits, on which the application for the appointment of a receiver was heard.

The bill, as amended, avers that of the 4,990 outstanding shares of the capital stock of the Jasper Land Company, the complainant owns 22 1-3 shares, having purchased the same on the 2d day of September, 1905; that the respondent Musgrove has controlled the affairs of the land company since the 29th day of April, 1901, owning or controlling over 4,700 shares of said capital stock; that he has abused his control of said corporation and his trust as vice president and general manager, and later as president; that he has loaned to himself, and to companies owned and controlled by him, large sums of money belonging to the land company; that he has called stockholders' meetings without notice, and has presented and had allowed by the stockholders and directors unfounded claims and demands against the land company; that on September 13, 1905, he procured to be declared a dividend of \$29.50 per share of the stock of the land company, which was paid out of the capital assets of the company; that he has taken and is now taking from the treasury excessive sums in the form of salaries and expenses; that he is in the absolute control of the said land company, and of its money, and assets; and that, unless the same is taken from him and protected by a court of equity, he will continue to appropriate the same to his own use, under various guises and devices, which would make it difficult, if not impossible, to trace

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and recover the same. It is not averred in the bill that either Musgrove or the respondent corporation are insolvent. The bill further shows that the defendant corporation has a board of directors and officers that have the management and control of its business and affairs, and it is not denied that these officers are administering the business purposes of the corporation, though it is charged that the board of directors are under the domination and control of the said Musgrove, and that through the mismanagement and fraud the corporation will ultimately be destroyed. The answer of Musgrove denies, circumstantially and in detail, the various charges of fraud and mismanagement, and avers that he is perfectly solvent and able to respond to any amount that may be found to be due to the land company upon any of the charges set forth in the bill. He offers to come to an accounting with the company and pay whatever may be found to be due from him to the company. It is further alleged in his answer that both he and the land company are entirely solvent. It is also averred upon information and belief that the complainant is not the bona fide owner of the 22 1-3 shares claimed by him, but that the transfer to him was merely colorable, in furtherance of a conspiracy to harass the respondent Musgrove by bringing this suit. The answer of the land company adopts the answer of Musgrove.

The general rule is well established that the power to appoint a receiver and sequester property will be exercised with great caution, and a resort to this remedy can only be had in extreme cases, and where it appears that without it the plaintiff will sustain irreparable loss. —Alderson on Receivers, § 49; High on Receivers (3d Ed.) §§ 18, 19; *Randle v. Carter*, 62 Ala. 95; *Fort Payne Furnace Co. v. Iron Co.*, 96 Ala. 472, 11 South. 439, 38 Am. St. Rep. 109; *Ensley Dev. Company v. Powell*, 147 Ala. 40 South. 137; *Gilreath v. Union Bank & Trust Company*, 121 Ala. 204, 25 South. 581. Another principle of law, which seems to be as well settled, is that, to justify the appointment of a receiver in limine before the decree upon the merits of the bill, two grounds must appear: First, a reasonable probability that the com-

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plainant will succeed ultimately in obtaining the general relief sought; second, imminent danger to the property, the subject of the suit.—3 Pomeroy's Equity Jurisprudence (2d Ed.) 1331; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Bank of Florence v. U. S. Savings & Loan Company*, 104 Ala. 297, 16 South. 110; *Warren v. Pitts*, 114 Ala. 69, 21 South. 494; *Pollard v. Fertilizer Company*, 122 Ala. 413, 25 South. 169. Again, a receiver should not be appointed at any stage of the proceedings if any other remedy will afford adequate protection to the party applying.—*Thompson v. Tower Manufacturing Company*, 87 Ala. 733, 6 South. 928; *Word v. Word*, 90 Ala. 81, 7 South. 412; *Etowah Mining Co. v. Wills Valley Mining Company*, 106 Ala. 497, 17 South. 522; *Bridgeport Dev. Co. v. Tritsch*, 110 Ala. 274, 20 South. 16; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 212.

It has been ruled by this court that the fact that the directors and officers of a corporation are fraudulently misappropriating the assets of the company will not alone of itself constitute ground for the appointment of a receiver. If they are solvent, they can be brought to an accounting, which will afford complete relief and is therefore an adequate remedy.—*Briarfield Iron Works v. Foster*, 54 Ala. 622; *Alabama Coal & Coke Company v. Shackelford*, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23; *Donald v. Export Company*, (Ala.) 38 South. 841. The facts in the case before us are much like the facts in the case of *Alabama Coal & Coke Co. v. Shackelford*, *supra*, and clearly distinguish the case at bar from that of *Morris v. Elyton Land Company*, 125 Ala. 263, 28 South. 513. Without more, on the facts here presented, we might safely rest the determination of this case on the principles stated in the case of *Coal & Coke Company v. Shackelford*, *supra*, and hold on the authority of that case that no sufficient reason or necessity exists for the appointment of a receiver in this case.

It is insisted by counsel for appellant in argument that the respondent Musgrove purchased the majority of the stock held and claimed by him in the respondent corporation with funds of the defendant company, that in so doing he violated his trust as president of the cor-

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poration, and that this gives to the beneficiary corporation the option of holding him to an accounting for the misappropriation of the company's funds, or of ratifying the transaction and claiming the shares of stock in the defendant company so purchased. The insistence in argument by counsel is then made that the exercise by the beneficiary corporation of the option to claim the stock would put into the ownership of the corporation a majority of its own stock, which would, of necessity, under the law, destroy corporate existence. It is conceded by counsel for appellant that the corporation would not have the right to go into the market and purchase its outstanding capital stock. This being true it is hardly to be supposed that a court of equity, in such a case as the one before us, where a complete remedy is afforded by having an accounting from the delinquent trustee, would lend its aid at the instance of a minority stockholder to an act of *felo dese* by the corporation in the application of the equitable doctrine of the right of election of a beneficiary under ordinary conditions and circumstances. The argument is ingenious, but we think, unsupported by sound reasoning.

We concur in the conclusion, reached by the chancellor, that the facts in the case do not justify the appointment of a receiver; and his decree will be affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

Phillips, *et al*, v. Bradford.

Bill to Cancel Mortgage.

(Decided June 6th, 1906. 41 So. Rep. 657.)

1. *Pleading; Amendment of Bill; Departure.*—The bill, seeking cancellation of a mortgage, alleged that while complainant was being pressed by creditors, respondent, complainant's brother, in whom she reposed confidence, and who managed her business,

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advised complainant to execute a bogus mortgage to him. By an amendment such allegation were stricken from the bill and superceded by sections which omitted all statements about complainant being pressed by claims, but alleged that respondent advised her, that to protect her rights in her land, and to preserve her homestead for herself and minor children, it was necessary for her to give him a mortgage. By other amendment, it is alleged that respondent unduly influenced complainant, and that it was not necessary for complainant to have given the mortgage to protect her rights in the land and to preserve her homestead. Held, the amendments were not departures from the original bill, as the amendments were consistent with and germane to the idea that the claims did exist, and that the giving of the mortgage was unnecessary, either because the claims could have been taken care of otherwise, or because complainant could have protected her homestead under the statute.

2. *Equity; Fraud of Complainant; Effect; Existence.*—The bill was not subject to demurrer on the grounds that complainant was guilty of fraud, or that the parties were in pari delicto.

APPEAL from Lee Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Mary L. Bradford to cancel a note and mortgage executed by her to respondents testator for want of consideration, etc. From a decree overruling demurrers to the bill respondents appeal. The pleadings are sufficiently set out in the opinion of the court.

J. W. STROTHER and R. C. SMITH, for appellant.—The bill as last amended is clearly a departure from the original bill.—*Penn v. Spence*, 54 Ala. 35; *Marshall v. Olds*, 86 Ala. 296; *Mobile Savings Bank v. Burk*, 94 Ala. 129. The amendment is clearly inconsistent with and a departure from the original bill in that it seeks relief on a different state of facts from that set up in the original.—*Ward v. Patton*, 75 Ala. 202. Matters which could not be alleged in the alternative in the original bill cannot be introduced into the amended bill by way of amendment.—*Clark v. Lydc*, 90 Ala. 246; *Winston v. Mitchell*, 93 Ala. 554. The averments of undue influence are clearly insufficient.—*Jackson v. Rowell*, 87

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Ala. 685. The bill shows on its face that the mortgage is made for the purpose of hindering, delaying or defrauding creditors of complainant, and it is therefore valid, *inter parte*.—*Glover v. Walker*, 107 Ala. 540.

GEORGE P. HARRISON, for appellee.—Court will watch with jealous care dealings between parties occupying fiduciary relations and relations in which dominion may be exercised by one person over another.—*Cannon v. Gilmer*, 135 Ala. 302; *Kyle v. Perdue*, 95 Ala. 585; *Ryan v. Price*, 106 Ala. 584; *Shipman v. Furniss*, 69 Ala. 556; 2 Pomeroy, Sections 943-951-955 and 956.

SIMPSON, J.—The original bill in this case seeks the cancellation of a note and mortgage made by the complainant (appellee) to the testator of defendant (appellant). Section 3 of the original bill alleges that, "while orator was being pressed on some indebtedness," her brother, Thomas L. Cobb, "in whom she reposed confidence and trust, and who was accustomed to aid and assist her in the management of her business, suggested and advised your orator to execute a bogus or false mortgage to him," which he told her would protect her against claims and threatened suits. The fourth and fifth sections relate to the execution of the bogus mortgage, that there was really no consideration for it, and she owed her brother nothing. By subsequent amendments said sections 3, 4, and 5 were stricken from the bill, and substituted by sections which omitted all statements about the complainant being pressed with claims, etc., but alleged that her brother, who attended to all of her business, "advised her that, in order to protect her rights in said lot and to preserve the same as a homestead for her and her minor children, it was necessary for her to give him a mortgage on said lot, which he told her at the time would be a bogus or false mortgage, and this would completely protect her against any claim; that complainant was not only a widow, but unacquainted with business methods and wholly ignorant of her rights in the matter; that said Cobb was not only her

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brother, but a man of intelligence and education, engaged in active business, and advised complainant in all important matters, and in whom at that time she had great confidence." It is then alleged that said brother induced her to execute the mortgage, which he had prepared, "to secure a pretended indebtedness," and that he paid her nothing, and that she was not indebted to him. The fourth section was again so amended so as to allege that said Cobb "unduly influenced" complainant to make the mortgage, and that it "was executed as the result of undue influence" by him. Then another amendment was made, by adding to said fourth section a statement that "it was not true that it was necessary for complainant to have given the mortgage in order to protect her right in said lot and preserve the same as a homestead, and that she did not voluntarily or of her own accord execute said mortgage, but was misled and deceived by the representations of the said Thomas L. Cobb, and thereby induced to execute said mortgage."

The first point raised by the demurrers, and insisted upon in argument by the appellant, is that the amendments are clearly inconsistent with the original bill and constitute a departure in pleading. We cannot see that there was such inconsistency as to constitute a departure. The purpose of the entire bill and amendments was to obtain a cancellation of the mortgage, and the general reason, running through all, why this relief is asked, is that it was improperly procured, without consideration by said Cobb. The relief prayed is the same. In fact, the first amendment, while it omits the statement that complainant was being pressed by claims, yet it carries with it the clear intimation that there were claims which were to be avoided, and the last amendment, while it alleges that it was not necessary to make the mortgage to save the homestead, does not allege that there were no claims to be avoided. The statements of the amendments are entirely consistent with the idea that the claims did in fact exist, but that the mortgage was not necessary, either because the debts could be otherwise provided for, or because the complainant

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could have protected her homestead by the simple process of filing her claim as provided by section 2065 of the Code of 1896.—*Park v. Lide*, 90 Ala. 246, 252, 7 South. 805; *Winston v. Mitchell*, 93 Ala. 554, 560, 561, 9 South. 551; *Berry v. T. & C. R. R.*, 134 Ala. 618, 621, 622, 33 South. 8.

The next point raised is that the evident purpose of the mortgage which is sought to be cancelled was to hinder, delay, and defraud creditors, and that, the complainant and respondents' testator being in *pari delicto*, a court of equity will not exert its powers in favor of either party. This is a clear principle of equity, laid down by the text-writers and adhered to by our own and other courts.—*Glover v. Walker*, 107 Ala. 540, 18 South. 251. There seems to have been some modification of this rule, as suggested by counsel for appellee. It is stated that "when a stronger mind takes advantage of a weaker and by persuasion and influences procures the unlawful act, or when the parties stand in such a relation that undue influence will be presumed, the reason which denies relief ceases to be applicable. * * * If the superior should be allowed immunity under such circumstances, he would be permitted to take advantage of his own wrong, and therefore equity will not refuse aid to the inferior."—14 Am. & Eng. & Ency. Law (2d Ed.) p. 279. Mr. Pomeroy, also, notes several exceptions; one being when "both have not with the same knowledge, willingness, and wrongful intent engaged in the transaction;" also where "there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it."—2 Pom. Eq. Jur. (3d Ed.) pp. 1717, 1718, § 942. Where a party to whom a deed was made to defraud creditors fraudulently had other lands than those intended to be conveyed included in the deed, relief was

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granted.—*Clemmens v. Clemmens*, 28 Wis. 637, 9 Am. Rep. 520. This was based, however, on the fraudulent act of the defendant, not participated in by the plaintiff. Id., 9 Am. Rep. 532. Where a husband represented to his wife that she was liable for certain debts (which was false), and induced her to convey property to him for the purpose of avoiding the debts, the deed was canceled, on account of the confidential relations and because there was a mutual mistake as to the facts; the court remarking "that the parties did not stand on equal terms."—*Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197, 199. Where a feeble old man, harassed by suits for alimony, etc., and whose wife had contracted considerable debts without his consent, was persuaded to convey his property to his nephew's wife as trustee, the conveyance was canceled. The court notes that it was "not found that B. made the conveyance to avoid the threatened suit."—*Nichols v. McCarty*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105, 113. In another case an illiterate young man was induced by his uncle, by false representations in regard to suits against the estate from which the young man inherited property, to have a deed to the property which the young man was purchasing conveyed to the uncle, the young man was granted relief against the uncle, because, first, of the confidential relations, and the defendant should not be allowed to profit by his own wrong; and, second, the statements being untrue, "there were no creditors to be defrauded."—*Williams v. Collins*, (Iowa) 25 N. W. 682, 683. In another case, where a client made a deed absolute on its face to his lawyer to secure advances amounting to much less than the value of the property, the deed was declared to be a mortgage, and the court says: "One of the purposes may have been to prevent other creditors from reaching it. We do not think, however, that under the circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not in *pari delicto*. One was the legal adviser, the other the client. * * * Equity will not tolerate the idea that an attorney may

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make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.”—*Herrick v. Lynch*, (Ill.) 37 N. E. 221, 223. In our own court, relief was granted in a case where the facts were similar to those in this case; but the question of *pari delicto* does not seem to have been raised.—*Cannon v. Gilmer*, 135 Ala. 302, 33 South. 659. While these cases are not all strictly analogous to the one before us, yet we gather from them and from the eminent text-writers cited, that in a case like this two maxims of the law meet—one that where the parties are in *pari delicto*, no affirmative relief will be granted to one against the other; and the other that one party who occupies a confidential relation to another cannot profit by any conveyance to him, without showing entire freedom from undue influence and a bona fide transaction on sufficient consideration. We gather, then, that where these relations exist the fact that the instrument that the weaker party was induced to make may have been illegal does not necessarily place her in *pari delicto* with the stronger party, who dominated her for his own profit.

On the subject of undue influence, under our decisions it is not “necessary to allege with particularity the *quo modo*, * * * but only that it was accomplished by undue influence exerted by named persons.”—*McLeod v. McLeod*, 137 Ala. 267, 270, 34 South. 228. Our decisions have also been very liberal to the weaker party in transactions of this character, holding that “the general principles which a court of equity applies to transactions between persons occupying fiduciary relations towards each other is not confined to cases in which there is any formal or technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, etc., but extends to all cases in which confidence is reposed by one party in the other and the trust is accepted under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties which gave the party an advantage or superiority; and in such case

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the onus is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motives entered into the transaction.”—*Kyle v. Perdue*, 95 Ala. 579, 585, 10 South. 103; *Ryan v. Price*, 106 Ala. 584, 17 South. 734. See, also, 2 Pom. Eq. Jur. (3d Ed.) pp. 1748, 1749, § 956 We desire, also, to call attention to another principle laid down by Mr. Pomeroy, who, in speaking of these cases where parties are in *pari delicto*, says: “The maxim, rightly interpreted, does not require the condition of the parties, with respect to the subsisting executory contract to remain unchanged and undisturbed. The remedy of cancellation * * * is simply the equitable proceeding identical with setting up the illegality as a defense to defeat a recovery at law, and thus get rid of the contract as a binding executory obligation.”—2 Pom. Eq. Jur. (3d Ed.) p. 1714, § 940. According to the allegations of the bill, as amended, the confidential relations existed, and the undue influence was used, the necessity to make the mortgage to secure the homestead did not exist, according to the statement in the bill, and the statutes of Alabama, in place of branding as fraudulent the saving of the homestead for the use of the mother and children encourages the same and has made special provisions by which this widow might have kept her homestead intact, and still remained in Auburn to educate her children.—§ 2069, code 1896. We hold that this is not a case where the doctrine of *pari delicto* should prevent the reparation of the wrong, if the mortgage was an attempt to defeat the claims of creditors contrary to law, it could never be enforced, and there seems no good reason why it should remain as a cloud on the title, and the remedy by cancellation, as Mr. Pomeroy says, was just accomplishing the same and as defeating the enforcement of it; so that, in either aspect of the case, the demurrers to the bill were properly overruled.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

[Wittmeier, *et al.* v. Tidwell.]**Wittmeier, *et al.* v. Tidwell.***Bill to Foreclose Mortgage.*

(Decided Feb. 6, 1906. 4 OSo. Rep. 963.)

1. *Mortgages; Right to Foreclosure; Tender of Amount Due.*—A sale under a mortgage is invalid where the amount due thereon was tendered before any steps were taken to make sale under the power.
2. *Same; Attorney's Fees.*—In order to terminate a mortgagee's right to foreclose a mortgage by sale under the power, where the mortgage provided for the payment by the mortgagor of all attorney's fees legally incurred in collecting the indebtedness or in foreclosing the mortgage, a tender of the attorney's fees legally incurred before the tender is necessary.
3. *Same; Pleadings.*—A bill averring a tender of attorney's fees to attorney of respondent, but not alleging that the tender was made before steps were taken to foreclose the mortgage, such averment was insufficient to show a valid tender.
4. *Same; Offer to do Equity; Payment into Court.*—Where the complainant offers to pay whatever is found to be due under the mortgage, that is a sufficient offer to do equity, without a payment of the money into court.
5. *Same; Parties.*—When the bill avers that the mortgagee has transferred or assigned the mortgage, but that the assignment did not divest him of the legal title to the property conveyed by the mortgage, such mortgagee is a proper, if not necessary, party respondent to the bill seeking to restrain the foreclosure.
6. *Pleadings; Conclusions.*—Where the allegation was that the mortgagor tendered the mortgagee the money and cotton called for by the mortgage, but without specifying the amount of either, such averment was insufficient, as it was a mere conclusion of the pleader.

APPEAL from Blount Chancery Court.

Heard before HON. A. H. BENNERS.

Wittmier sold Bentley a certain piece of land, taking the mortgage to secure the deferred payments which were evidenced by four promissory notes falling due No. 1, 1905, 1906, 1907 and 1908. The first note provided for

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the payment of one thousand pounds good, average lint cotton and \$23.59, and the others for one thousand pounds good, average lint cotton each. The mortgage contained the following clause: "If said grantor shall sell, transfer, trade or remove any of said property, or attempt the same, then all of said notes shall at once become due and payable; and in either one of said events, the grantor hereby agrees to pay all costs, expenses and attorney's fees that may be legally incurred in collecting the indebtedness aforesaid, or in foreclosing this mortgage." The mortgage contained the further stipulation: "The refusal to be given to J. S. Wittmier when selling." Wittmier transferred this mortgage to Bradford, and on Dec. 3rd, 1904, Bentley sold and conveyed the land covered by the mortgage to Tidwell, whereupon Bradford elected to mature the indebtedness secured by the mortgage and advertise the land for sale under the power therein. Tidwell filed this bill praying for an injunction to restrain Bradford and his attorneys from foreclosing alleging first, that the accelerating clause in said mortgage was invalid and inoperative and that the foreclosure was premature. Second, in the event the accelerating clause was valid and the debt was due, he had tendered to the attorney of Bradford and to Wittmier the money and cotton due under the terms of the mortgage. Respondents demurred to the bill, made a motion to dismiss it for want of equity and to dissolve the injunction. From a decree overruling the motion this appeal is prosecuted.

GEORGE L. SMITH, for appellant.—Parties may contract for a stipulated contingency to mature a mortgage, and the character of the contingency is one of no consequence.—*Chambers v. Marks*, 93 Ala. 412; *Keith v. McLaughlin*, 105 Ala. 339; *Parker v. Oliver*, 106 Ala. 549. The accelerating clause was not a penalty.—*Parker v. Oliver*, *supra*; *Chambers v. Marks*, *supra*. The mortgagee had the power to sell the entire property upon default and after paying the installments due retain the surplus to meet other installments.—*McLean v. Presley*, 56 Ala. 211; *Fulgham v. Morris*, 75 Ala. 245. The ac-

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celerating and option clauses are not repugnant.—1 Jones on Mortgages, § 101; *Mason v. Ala. Iron Co.* All instruments must be construed against him who gives or undertakes or enters into an obligation.—*Nelson v. Manning*, 53 Ala. 549; *Seay v. McCormick*, 68 Ala. 549; *Comer v. Bankhead*, 70 Ala. 136. It was not sufficient to tender the \$23.59 and the four thousand pounds of cotton after the law day of the mortgage. It should have been tendered on the law day.—*Powe v. Powe*, 42 Ala. 116; *Toulmin v. Säger*, 42 Ala. 123; *Rudolph v. Wagner*, 36 Ala. 698. After the law day the contract was breached and the damages became liquidated, in the amount of \$423.59, and that amount should have been tendered.—*Rody v. McGetterick*, 49 Ala. 62; *Keeble v. Keeble*, 85 Ala. 552. Complainants have a plain and adequate remedy at law.—*Keith v. McLaughlin*, 105 Ala. 339; *Sullivan v. McLaughlin*, 99 Ala. 60. The tender was not sufficient as no tender was made of attorney's fees.—*McAuley v. Otey*, 103 Ala. 469; A. & E. Enc. of Law, pp. 17 and 32. Nor was the tender offered to be kept good.—*Frank v. Pickens*, 69 Ala. 369; *Welch v. Phillips*, 54 Ala. 309; *Marxell v. Moore*, 95 Ala. 171. Nor was the tender maintained a sufficient length of time.—*Hamaker v. Bynum*, 137 Ala. 391.

EMORY C. HALL, for appellee.—A court of equity will enjoin the sale or set it aside if it is attempted to pervert the power from its legitimate purposes for any reason.—*Loan Asso. v. Lake*, 69 Ala. 456; *Struve v. Childs*, 63 Ala. 472; *McAuley v. Otey*, 90 Ala. 302. The bill may be filed in a double aspect averring full payment and yet offering to pay any balance due.—*Fields v. Helms*, 70 Ala. 460; *Whitney v. Dunham*, 89 Ala. 493. It is not essential to the equity of the bill that it aver tender prior to the filing.—*McQuire v. VanPelt*, 55 Ala. 344; *Hammett v. White*, 128 Ala. 380. In the absence of an answer verified and containing full and complete denial an injunction will not be dissolved unless the want of equity in the bill is apparent on its face.—*E. & W. R. R. Co. v. E. T. V. & G. R. R. Co.*, 75 Ala. 275; *Jones v. Ewing*, 56

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Ala. 360. Under the assignment of the mortgage the legal title did not pass and both Bradford and Wittmier were necessary parties thereto.—*Barron v. Barron*, 122 Ala. 192; *Moon v. Jacob*, 103 Ala. 548.

ANDERSON, J.—“Generally, the purpose for which the power of sale is given being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by the contract bound to exercise necessary promptness in fulfilling it, and cannot complain of a legitimate exercise of the power. If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside if it is made.”—2 Jones on Mortgages, 1801; *Loan Association v. Lake*, 69 Ala. 456; *Struve v. Childs*, 63 Ala. 473. The bill in the case at bar avers that the amount due upon the mortgage was tendered before any steps were taken to make a sale under the power contained. If this be true, a sale would be a useless ceremony for collecting the debt, which was the only purpose for which the power to make was given; and if the sum due had been tendered, and the mortgagee refused to accept it and proceeded to make a sale, this would be a clear perversion of the power, which would amount to oppression. The bill avers that the mortgagee did not accept the tender, but claimed that \$40 would be due as attorney's fees, and thereupon advertised the property for sale. Of course, the mortgagor must have tendered what was due, else the mortgagee would have the right to sell the property to collect what was due him; and if a part, and not all, had been tendered him, he could still make the sale, which would not amount to oppression or a perversion of the power.

The bill does not aver a tender of the attorney's fees, so, if the same were due, the tender was not sufficient. If, on the other hand, it was not due and owing, then he

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clearly had no right to sell the property, if everything else due had been tendered. The mortgage provides for the payment of all attorney's fees "that may be legally incurred in collecting the indebtedness or in foreclosing this mortgage." The bill avers that the tender was made to the attorney of the respondent, but does not aver that it was made before steps had been taken to foreclose the mortgage or collect the debt. If the respondent had incurred any attorney's fee before the tender was made, such reasonable attorney's fee so incurred should have been tendered, as well as any costs incurred in a foreclosure before the tender. The third ground of demurrer should have been sustained. The bill sufficiently offers to do equity by offering to pay the amount due, and it is not necessary that it should have been paid into court, if such a thing were possible in the case at bar.—*Loan Association v. Lake, supra*; *Rogers v. Torbut*, 58 Ala. 523.

The bill avers that Wittmier had assigned the mortgage to Bradford, but the assignment as disclosed on the mortgage did not divest Wittmier of the legal title.—*Robinson v. Cahalan*, 91 Ala. 479, 8 South. 415; *Sanders v. Barron*, 122 Ala. 194, 25 South. 55. In this case Wittmier was a proper, if not a necessary, party.

The chancellor erred in overruling the fifth and sixth grounds of demurrer. The bill does not set up the amount tendered, or the quantity and class of the cotton, but simply avers "the money and cotton called for by the mortgage." This was but a conclusion of the pleader, and the bill should have specified and defined what was tendered, in order that the chancellor could ascertain whether or not it was the "money and cotton called for by the mortgage."

The decree of the chancellor is reversed, and the cause remanded.

TYSON, DOWDELL, and SIMPSON, JJ., concur.

[Montgomery Light & Water P. Co. v. Citizens L., H. & P. Co.]

Montgomery Light & Water P. Co. v. Citizens L. H. & P. Co.

Bill for Injunction.

(Decided April 20th, 1906. 40 So. Rep. 981.)

1. *Pleadings; Conclusions.*—The grounds of relief averred in the bill, and on which an injunction is sought to restrain one light company from stringing wires upon a pole belonging to the other light company, are that there has already been strung on said pole all the wires it would bear with safety to its service and security to the people, and that notwithstanding this fact and the further fact that the city ordinances forbade defendant from interfering with poles and wires of complainant, defendant is attempting to string and is stringing its wires on the pole, and unless interfered with would so string its wires as to result in irreparable damage to complainant, and render the pole absolutely dangerous to the lives of people walking on the street; and in addition make it impossible for complainant to attend to securing its own wires on the pole, endanger the lives of its employees, who are frequently compelled to climb the pole to repair complainant's wires, and prevent it furnishing current for lights to the people. Neither the size or capacity of the pole, the number of wires strung thereon, the proximity of the wires to each other, nor their location is alleged. Held, mere conclusions and subject to demurrer.
2. *Injunction; Dissolution; Grounds.*—Considering the averments of the bill together with the denials and averments of the answer, it is held that the preliminary injunction should not be retained until final hearing on the theory that defendant was seeking to take complainant's property without just compensation.
3. *Electric Companies; Franchise; Arbitration; Agreement.*—Where an electric company accepts a franchise under an agreement that its poles may be used by another company for a compensation to be agreed upon between the companies, and in case of disagreement the compensation to be decided by the city electrician, it is bound, either to agree as to the compensation, or accept the arbitrament of the city electrician, unless such arbitrament is shown to be arbitrary or corrupt.

[Montgomery Light & Water P. Co. v. Citizens L., H. & P. Co.]

APPEAL from Montgomery City Court.

Heard before HON. A. D. SAYRE.

Bill by the Montgomery Light & Water Power Company against the Citizens' Light, Heat & Power Company. From a decree dissolving a preliminary injunction, complainant appeals.

R. E. STEINER and HORACE STRINGFELLOW, for appellant.—Complainant is entitled to an injunction to prevent the use of its poles by the defendant until compensation has been made.—*Birmingham Traction Co. v. Birmingham Electric Co.*, 119 Ala. 121. Condemnation proceedings cannot divest the owner of his property unless every prerequisite to the jurisdiction called for by the statute is strictly complied with, and this must affirmatively appear on the face of the proceedings.—*McCully v. Cunningham*, 96 Ala. 584; *Bottom v. Brewer*, 54 Ala. 288. The refusal of complainant to agree upon compensation gave respondent no right to use the poles without paying compensation therefor.—119 Ala. 129. The injunction was improperly dissolved and should be re-instated.—Authorities supra.

PHARES COLEMAN and CRUM & WEIL, for appellee.—No brief came to the reporter.

DENSON, J.—The bill is exhibited by the Montgomery Light & Water Power Company, a corporation, against the Citizens' Light, Heat & Power Company, a corporation. Each of the corporations is possessed of a franchise granted by the municipal authorities of the city of Montgomery, authorizing it to erect and maintain along the streets of the city poles and wires for the purpose of enabling it to supply electric lights to its patrons. The purpose of the bill is to enjoin the defendant from stringing its wires on one of the complainant's poles. On the hearing on the bill and answer, the chancellor dissolved the preliminary injunction, and from the decree of dissolution the complainant appealed.

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The complainant is the older of the two corporations and had completed its line. One of its poles (the one involved in this controversy) is located on the northeast corner of Commerce street and Court Square. The only ground for injunctive relief, as shown by the original bill, is found in the third section of the bill, which is as follows: "The Montgomery Light & Water Power Company already has strung upon its pole on the northeast corner of Commerce street and Court Square all the wires that said pole will bear with safety to its service and security to the people of Mantgomery, but notwithstanding this fact, and notwithstanding the fact that said ordinance of the city council of Montgomery expressly forbade the Citizens' Light, Heat & Power Company from interfering with the poles and wires of orator, nevertheless said Citizens' Light, Heat & Power Company is attempting to string and is stringing its wires on said pole, and unless it is interferred with it will so string its wires, which will result in irreparable damage to your orator, and make said pole absolutely dangerous to the lives of the people of the city of Montgomery who are walking the streets thereof, and in addition thereto will make it impossible for your orator to attend to the securing of its own wires on said pole, endangering the lives of its employes who are compelled to frequently climb the said pole for the purpose of repairing your orator's wire, and prevent it from successfully furnishing current to the people of Montgomery for lights." The respondent filed a sworn answer to the original bill, specifically denying each and all the averments upon which the appellant's supposed right of relief was founded. The cause was set down for hearing on motion to dissolve the injunction. On the day fixed for the hearing the bill was amended by attaching as an exhibit to the bill a copy of the ordinance passed by the city council of Montgomery under which the defendant was operating, and by averring "that, if said Citizens' Light, Heat & Power Company is permitted to string its wires on said pole in the manner hereinbefore averred, it will be without the consent of the own-

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er, and the taking of the private property of orator and applying the same to the use of the said Citizens' Light, Heat & Power Company without just compensation being first made therefor." The hearing was postponed, and the bill as amended was answered. We will advert to the answer later on in this opinion.

It is here insisted by the appellee that in considering the motion to dissolve the injunction we should do so upon the bill as it was originally filed, and upon which the injunction was granted, and that no consideration should be given to the facts contained in the amendment to the bill. "In other words, the injunction must stand or fall upon the sufficiency of the bill as originally filed, and cannot be propped up by subsequent amendments. Therefore, if by reason of the insufficiency of the averments in the original bill the injunction was improvidently issued, it was properly dissolved, without regard to the subsequent amendment. In the view that we shall take of the case it is unnecessary for us to determine this question of practice. We remark, however, that in the case of *Mack v. De Bardeleben Coal Co.*, 90 Ala. 396, 8 South. 150, 9 L. R. A. 650, the right to amend an injunction bill seems to be recognized. The ordinance attached by complainant as an exhibit to the bill as amended, and under which it is alleged the defendant was operating, contains a provision that defendant's wires shall not be erected and strung so as to interfere with the poles and wires of any other company. In a similar case between these same litigants, in which this ordinance was involved, it was said: "The fact that defendant was under a contract obligation so to erect its poles and wires as not to interfere with the poles and wires of complainant does not change the rule of law that the complainant, seeking an injunction, must by his bill show the necessity for it by the statement of facts, from which the court may decide, and not by the mere statement that complainant will be irreparably injured. The only difference is that, if the contract prescribed any terms different from those which the law would demand without the special contract, then the allegations must be of facts which would

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show a violation of the contract or condition prescribed by the city ordinance, which if there were no contract or ordinance prescribing conditions, the allegations would have to show facts from which the law would infer actionable injury." In this respect it would seem that it cannot be successfully contended that the averments of the original bill are more than conclusions of the pleader. The size of the pole, its capacity, the number of wires thereon, the proximity of these wires one to another, or their location on the pole, are material facts wholly undeveloped by the bill, original and as amended.—*Montgomery Light & Water Power Company v. Citizens' Light, Heat & Power Company*, 142 Ala. 462, 38 South. 1026.

Neither of the parties claim any exclusive privilege or franchise to use the streets of the city. Such claim, if it were made, would be futile under the principles of law applicable to the grant of franchises by municipal corporations or natural persons for the purpose of erecting and maintaining public utilities.—Const. § 22; *Montgomery Light, & Water Power Company v. Citizens' Light, Heat & Power Company*, *supra*, and authorities there cited. By the amendment to the bill it would seem that the complainant does claim the exclusive ownership and privilege with respect to the pole in controversy; and the insistence by the appellant is that the bill as amended shows that the respondent was, by stringing or attempting to string its wires on the pole as alleged, taking or attempting to take the private property of the appellant without its consent and without just compensation being first made therefor. Therefore it is argued by the appellant that the bill as amended is brought within that class of cases in which it has been held that where "it is affirmatively and distinctly averred that property of which the complainant was possessed has been wrongfully taken possession of by a defendant, which has not proceeded to its condemnation in the mode prescribed by law, and has not, in obedience to the constitution, made therefor just compensation, these facts of themselves, without regard to any question of irrepara-

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ble injury, give the court jurisdiction to prevent the further invasion of the property by injunction." The court in the case of *Highland Ave. & Belt R. R. Co. v. Matthews*, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462, speaking of this branch of equity jurisdiction, said: "The jurisdiction of a court of equity to prevent the commission of such a wrong is not based upon the absence or inadequacy of legal remedies for the recovery of damages for the wrong when it has been consummated. The recognized equitable remedies may find support upon either of two grounds: (1) Upon the special jurisdiction of courts of equity to confine corporations to the exercise of the powers conferred upon them by law; and (2) upon the inadequacy of legal remedies to protect the constitutional right in its entirety, courts of law being unable to compel the payment of compensation to the property owner before his property is taken, injured or destroyed." In this view of the case it would be of importance "to subject to analysis the allegations of the bill and determine whether irreparable injury, in the sense of that term in a court of equity, is shown by them."—*Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 South. 368; *Birmingham Traction Co. v. Sou. Bell Co.*, 119 Ala. 144, 24 South. 731.

Granting that the averments of the bill as amended show that the respondent is a corporation vested with the authority to exercise the right of eminent domain, we must examine the case as presented by the bill as amended and the answer thereto, and determine whether or not the injunction was rightfully dissolved. In its answer to the bill as amended the respondent makes specific denial of the facts set up in the amended bill, and also avers that at the time the complainant was granted by the city authorities the franchise under which it was operating there was in force in the city an ordinance which provided that all companies erecting or operating electric light and power wires, telephone or telegraph wires, or any other wires in the streets or along the alleyways or across the public places of the city of Montgomery, should occupy the same poles that were at

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such time in use by any other electric company, whenever such joint use was practicable, to be determined by the committee of electric control of the said city council of Montgomery, and that the company so stringing its wires upon any pole or poles already in use by any electric company should pay to the latter such rental or compensation for the joint use of such poles as said companies might agree upon, and, if they failed to agree, then such as may be fixed by the city electrician of the city of Montgomery. It is further shown in the answer that by an ordinance contract made on the 30th of April, 1902, "between the appellant and the city council of Montgomery, all poles then or thereafter erected and all wires then or thereafter strung by appellant should be subject to the then existing or any future ordinance that might be passed as far as applicable, and that the city council, in its discretion, might grant permission to any other electric light, telegraph, telephone, or other companies using wires to string their wires upon the poles of appellant, upon condition that such other companies should pay a reasonable compensation for the use of said poles." It is then shown by the answer that the city council of Montgomery adopted a resolution whereby the committee of electric control of said city council, together with the city electrician, were directed to designate what poles in use by other companies along the route described by the city electrician for this respondent to string wires should be used by the respondent, and to determine which of the poles so designated it was practicable for respondent to use in stringing its wires jointly with the complainant. It is then shown that the committee on electrical control and the city electrician ascertained that the joint use of the pole in controversy was practicable, and the committee on electrical control, after investigation, authorized and directed respondent company to string its wires on said pole. It is further shown that, the parties (complainant and defendant) having been unable to agree on the compensation to be paid, the city electrician fixed the amount, which appellee tendered to the complainant, and the complainant refused and declined to accept the amount.

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The complainant having accepted its franchise under the conditions stipulated in its contract and the ordinances of the city then in existence, it cannot be said that it is not bound by the qualifications fixed upon the franchise by the contract and ordinance. It is obvious from a glance at the contract and ordinances in the record that the city, as it had a right to do, reserved the right to regulate the use by complainant of the poles set by it, and, proceeding in accordance with the terms of the ordinance and contract, that it had the right to determine whether or not it was practicable for the defendant to use the pole in controversy jointly with the complainant; and in doing this we will presume that it was done by the authorities with due consideration for the rights of the parties and the safety of the public, and, further, that under the direction of the city authorities the respondent might use the pole, making compensation to complainant as required by the law. Under the denials in the answer, which are specific and full, the averments therein which are responsive to the bill, it seems to us that the injunction could not be retained on the theory that appellant's property was sought to be taken without just compensation. It is true the compensation was not paid, but it is also true that it was the complainant's fault that it was not. The amount of compensation was fixed, as was required by the ordinance it should be, after the complainant had declined to agree with the defendant on the amount. The amount fixed was tendered to the complainant, and it declined to receive it. We do not see what more could have been done by the defendant, and the complainant cannot be allowed to make a case on this point for equitable interference by its obstinacy.

We are aware that it was said in the case of *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.*, *supra*, that refusal or failure to agree on the amount of compensation to be paid afforded no right or excuse for the taking of property of another without condemnation proceedings and payment of compensation. Grant-

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ing that this is a case in which condemnation proceedings might have been resorted to, that case is not an analogous case. In that case there was no duty to agree. Here both parties were acting with respect to privileges granted them by the municipality and with respect to property over which the municipality had reserved the right of regulation with regard to the very matter in dispute. The appellant having accepted its franchise under the conditions adverted to, was in duty bound to either agree on the compensation or accept the arbitrament of the city electrician, unless shown to be arbitrary or the result of corruption.

Finally, we conclude, as did the chancellor, that it is the safer course to allow the direction of the municipal authorities to prevail until upon a final hearing the merits of the respective contentions may be fully examined and made plain. The decree dissolving the preliminary injunction is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON, and DOWDELL, JJ.,
concur.

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Bill to Enjoin Change of Grade of Street.

(Decided June 30th, 1906. 41 So. Rep. 1025.)

1. *Municipal Corporations; Change of Grade of Street; Damages; Remedies of Property Owners.*—The property owner is entitled to injunctive relief, irrespective of the city's solvency or of the fact that he might obtain full compensation at law, where the municipality undertakes to change the grade of a street to the injury of the property abutting thereon, without first having compensated the owner.
2. *Same; Damages; Waiver.*—The fact that the owner of property abutting on a street petitioned the municipality for the pav-

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ing of the same is not a waiver of damages resulting from a change of grade in constructing the pavement.

3. *Same; Remedies of Property Owner.*—The city having commenced to change the grade of a street without compensating the owner of the property abutting thereon for injury thereto, the property owner may, by bill for injunction, have the street restored to its former condition.
4. *Injunction; Motion to Dissolve New Matter; Effect.*—On a motion to dissolve the injunction, new matter not responsive to the allegations of the bill cannot be considered.
5. *Same; Terms of Dissolution.*—It was proper to have dissolved the injunction on the city's making a cash deposit and executing a bond to cover probable damages to be ascertained on a reference, in a suit by the owner of abutting property for an injunction to restrain a change of the grade without having made compensation therefor.
6. *Appeal; Decisions Reviewable; Equity; Decree Overruling Plea to Bill.*—The judgment of this court may be had upon the sufficiency of a defense interposed by plea in advance of the taking of the evidence or a hearing on the merits, under Section 427, Code 1896.
7. *Equity; Setting Plea for Hearing; Effect.*—The setting down of a plea to a bill for hearing on its sufficiency is an admission of the truth of all the facts alleged for the purpose of invoking judgment as to whether the facts constitute a defense.
8. *Same; Pleas; Necessity of Verification.*—In the absence of any rule or statute requiring it pleas to a bill in chancery need not be verified.
9. *Same; Duplicitous.*—A plea is not duplicitous which does not contain independent sets of facts, each constituting a sufficient defense.
10. *Municipal Corporations; Changing Grade of Street; Damages; Waiver.*—If the owner of property abutting on a street has been informed of a proposed change of grade and thereupon requested the official in charge of the work to proceed with it, and the city, acting upon such request, incurred expenses in preparing for the change of grade, and commenced the work, the owner was not entitled to an injunction, although no compensation has been paid him.
11. *Same; Nature of Liability; Remedies of Owners.*—The fact that there has been no negligence in or about the way in which the work was done in making the change, does not deprive the owner of abutting property of the right to have the street restored to its former condition, where the city undertakes to

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change the grade without making compensation to the owner for injury done the property.

12. *Equity; Pleading; Bill; Sufficiency; Dismissal.*—The allegations of a bill which is clearly susceptible to the construction that the right of the complainant is predicated upon the injury to his property interest in the lot abutting the street, the grade of which is proposed to be changed, and which the bill showed would be substantially injured, although susceptible of the construction that he based his relief to some extent on his supposed property interest in the street, does not render the bill subject to dismissal for want of equity, the defect being an amendable one.

APPEAL from Morgan Chancery Court.

Heard before HON. W. H. SIMPSON.

William Scharfenberg files his bill against the town of New Decatur to prevent the town from raising the grade of Second avenue and Holly street from its present altitude, nearly two feet, causing appellant's store floor to be nearly a foot and a half below the then grade of the street on which it abuts. A reference was ordered to ascertain the damages. The bill was demurred to and pleas interposed setting up that appellee signed a petition to have said streets paved with bricks, and that it was necessary to raise the grade to do so. An injunction was granted appellee and upon the reference his damages were ascertained and reported and a decree was entered overruling the motion to dissolve the injunction upon any other ground than the prepayment of the estimated damages, and from this decree the town prosecutes this appeal.

BROWN & KYLE, for appellee.—No brief came to the reporter.

E. W. GODBY, for appellee.—No brief came to the reporter.

WEAKLEY, C. J.—The bill was filed to enjoin the town of New Decatur from damaging complainant's store property by certain proposed changes in the

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grades of the contiguous streets, upon the allegation that the municipality had not first paid complainant for the injury that would result, and to require the town to restore the streets to their former condition. Upon the filing of the bill, a preliminary injunction was issued. The defendant filed a motion to dismiss for want of equity, a motion to dissolve the injunction, a demurrer, several pleas, and a sworn answer. The chancellor overruled the motion to dismiss the demurrer and held the special pleas insufficient. He also overruled the motion to dissolve the injunction unconditionally; but, in response to a prayer to that effect in the answer, ordered a reference to the register to ascertain the probable damages, and, on the coming in of the report, the payment of the ascertained sum into court, and the execution of a bond to pay such damage as the complainant might sustain, the chancellor dissolved the injunction.—*C. & W. R. R. Co. v. Witherow*, 82 Ala. 190, 3 South. 23.

Whatever may be the law elsewhere, it is too well settled in this state for further controversy "that, under constitutional guaranties, a municipal corporation may not take or injure the property of a citizen in the exercise of its power to improve its highways without first making compensation; and the right to injunctive relief in such a case as this exists without reference to the solvency or insolvency of the municipality and regardless of the consideration that he might recover full compensatory damages in an action at law."—*City Council of Montgomery v. Lemle*, 121 Ala. 609, 25 South. 919; *Arondale v. McFarland*, 101 Ala. 381, 13 South. 504; *Niehau v. Cooke*, 134 Ala. 223, 32 South. 728. We have, therefore, no doubt of the equity of the bill, unless its equity is destroyed by the allegations it contains respecting the petition by defendant and other citizens to the city council, wherein they requested the paving of Second avenue in front of complainant's property, and preparatory to which the change of grade and other work complained of had been ordered. We are not of opinion that the petition merely to pave the avenue

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would be a waiver of damages growing out of the change in the grade of the highway, as set forth in the bill; such waiver of a constitutional right ought not to be lightly inferred, and cannot be clearly derived from the request to pave the avenue and the agreement to bear a part of the expenses of the paving.—*Newville Road Case*, 8 Watts (Pa.) 172; *Barker v. City of Taunton*, 119 Mass. 392; *Birdseye v. City of Clyde*, (Ohio) 55 N. E. 169; *Jones v. Borough of Bangor*, 144 Pa. 638, 23 Atl. 252. As said by the supreme court of Massachusetts in *Barker v. City of Taunton*, 119 Mass. 392, "it is no bar to the claim for damages made by the petitioner that he was one of the original petitioners for the improvement—that alone is not evidence of an assent that his property shall be taken for public use without compensation." While the court uses the words "taken for public use," the facts of the case show that it was similar to the one before us, and that damages were claimed for injury to plaintiff's premises by lowering the grade in the construction of a sidewalk. There, also, the plaintiff had merely petitioned for the construction of a sidewalk. The complainant would also have the right, upon the averments of his bill, no compensation having been first made for the injury, to require the city to restore the street to its former condition, as well as to enjoin further acts of damages. A court of equity does not administer partial justice, but, taking jurisdiction in a proper case, ever seeks to conclude the whole controversy. The motion to dismiss the bill for want of equity was properly overruled. What we have said above also applies to and covers the questions presented by the demurrer, and in overruling this no error was committed.

The answer did not deny the averments upon which the equity of the bill rested, and new matter, not responsive to the bill, cannot be considered on motion to dissolve. The defendant was not entitled to an unconditional dissolution.—*Nichaus v. Cooke*, 134 Ala. 223, 32 South. 728. The chancellor followed the practice approved by this court, and requested by the defendant, in dissolving the injunction upon the making of a cash de-

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posit and the execution of the bond, thus allowing a public work to proceed, and the town has no cause of complaint against the ruling upon its motion to dissolve the injunction.

This leaves for consideration pleas 4, 5, and 6, assignments of error specifying these as having been erroneously held insufficient.

Pleas 4 and 5 present substantially the same question and they may be considered together. A careful reading of the bill shows that the gravamen of the complaint is that the city is preparing to change the grade of the highway in front of complainant's property, without his consent and against his objection. So far as the work has proceeded, it has been done in pursuance of the plan to alter the grade, preparatory to laying the brick pavement on the elevated line; and the incidental consequences, alleged in the bill, showing the modum of the injury, are all attributed to the execution of the purpose by the city to establish a new grade for the highway. The question, therefore, is whether under the averments of pleas 4 and 5 the complainant was entitled to restrain the proposed work, or, upon the hearing, if these pleas should be proven, ought to have a decree for compensation. By section 427 of the code of 1896 an appeal lies to this court from a decree by the chancellor overruling a plea to a bill, or what is the same thing, holding it to be insufficient; in this way, the judgment of this court may be obtained upon the sufficiency of a defense in an equity case interposed by plea, in advance of the taking of evidence, or a hearing upon the merits.—*Glasser v. Meyrovitz*, 119 Ala. 152, 24 South. 514. Several separate pleas may be filed or they may be incorporated in the answer, in which latter event they must be treated as independent pleas. The setting down of a plea for hearing upon its sufficiency operates as an admission of the truth of all the facts alleged for the purpose of invoking the judgment of the court upon the legal question whether these facts constitute a defense to the bill.—*Tyson v. Land Co.*, 121 Ala. 414, 26 South. 507; *Glasser v. Meyrovitz*, 119 Ala.

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152, 24 South. 514. Unless there is some rule or statute requiring it, pleas need not be verified by affidavit; these before us are not open to objection, because no one swears to their truth.

If duplicity be a ground of objection to a plea in equity, it is not under our system in the case of a plea in a court of law.—(*Bolling v. McKenzie*, 89 Ala. 470, 7 South. 658; *Corpening v. Worthington*, 99 Ala. 541, 12 South. 426) yet we are of opinion the pleas now under consideration are not double. They do not contain two independent facts, nor two separate sets of facts, each constituting a sufficient answer to the bill. We have already held that the petition for the paving did not, in and of itself, operate to waive the complainant's right to damages, or his equity to restrain the work until compensation should be paid or secured to him for the injury to his storehouse and lot under the practice of the chancery court in cases like this. The averments of the plea in respect of the petition for paving, and the decision of the city council to do the work, are matters of inducement leading up and converging to the one defense which they bring forward. This defense is that the complainant on being informed as to the proposed change of grade, and with knowledge of the new curb line, requested the city officials in charge of the work to proceed with the work, saying he intended to raise his house anyway and that he wished the street properly fixed while they were about it, so there would be no trouble concerning the street thereafter; and that the defendant acting upon the declaration and conduct of the complainant had gone to much expense in preparing the avenue to be paved according to the plans of the engineers, and had rendered itself liable for the payment of large sums for laborers and teams engaged to plow up the street and prepare it for the brick pavement.

The important question then is whether a citizen who consents to a change of grade, requests that the change be made, and who thereby induces the city to incur expense in and about the work, can recover damages to his property because of the altered grade, or arrest the

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doing of the work in the midst of it, upon the ground that compensation for the injury had not first been paid him.

It has been expressly held that a person asking for the change of grade cannot complain; the case being within the maxim, "volenti non fit injuria."—*Cross v. Kansas City*, 90 Mo. 13, 1 S. W. 749, 59 Am. Rep. 1. When a person has consented to the act being done he may not exercise his legal right in opposition to that consent.—*Morris C. & B. Co. v. Lewis*, 12 N. J. 323. And this court in *Goetter v. Norman*, 107 Ala. 585, 19 South. 56, has expressed its approval of the rule as quoted by Mr. Story from a decision of the House of Lords: "It is a general law that if a man either by words or conduct has intimated that he assents to an act which has been done and that he will not offer opposition to it, although it could not have been lawfully done without his consent, and he thereby induces another to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct." A constitutional provision affecting simply property rights may be waived by the citizen.—*Lee v. Tillotson*, 35 Am. Dec. 624; *Coley's Con. Lim.* (7th Ed.) 250. Whether the facts set up by the fourth and fifth pleas be called a "waiver or an estoppel," we are of opinion they constitute a defense to the bill, and that the chancellor erred in holding them insufficient.

The sixth plea proceeds upon the theory that having the power to grade and pave streets, the absence of negligence in and about the work would defeat the right of the complainant to have the street restored to its former condition. It is not upon the want of power to grade, nor upon the existence of negligence, that the equity of the bill rests. It rests upon the constitutional guaranty to the citizen against the taking or injuring of his property without prior compensation. The sixth plea was insufficient, and the chancellor's decree to that effect was not erroneous.

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The decree of the chancellor, in so far as it holds 4 and 5 to be insufficient will be reversed and a decree will be here rendered declaring them sufficient. In all other respects his decree will be affirmed. The cause will be remanded. Let the costs of the appeal accruing in this court and the city court be divided equally between the parties.

Affirmed in part, reversed and rendered in part, and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

TYSON, J. (On rehearing.)—I do not construe the averments of the bill as resting the equity sought to be enforced upon an injury to complainant's interest in the avenue or street, but to his storehouse and lot abutting thereon. It is undoubtedly the law that the city has the legal right to change the grade of the street without compensation to adjoining lot owners if there be no injury done to their property. In other words, an adjoining lot owner on a street has no such property interest in the street as entitles him to compensation for a change in the grade of the street by the city. As said in *City Council v. Townsend*, 84 Ala. 486, 4 South. 780, it is "both the privilege and duty of a city government to so grade the streets or change their grade as to make them safe and convenient, and this power is conclusively presumed to have been conferred when the dedication was made." But in the exercise of this privilege and duty, if the property of an abutting owner is or will be injured thereby, clearly under our constitutional provision and adjudged cases he may restrain the further prosecution of the improvement of the street by the city until just compensation is paid to him for the injury done or about to be done to his abutting property.

It may be that the eleventh paragraph of the bill is susceptible of the construction that complainant bases his relief to some extent upon his supposed property right in the avenue, but it is also clearly susceptible of the construction that his right is predicated upon his property interest in his storehouse and lot (and not in

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the avenue) which the bill distinctly shows will be substantially injured should the improvement by the city of grading the avenue be permitted to progress. There is no ground of demurrer specifically raising this point, and clearly the motion to dismiss cannot avail as against an amendable defect, which this is.

It is true the opinion does not exclude complainant's right to relief on account of his supposed property rights in the avenue. And its failure to do this coupled with certain expressions contained in it is calculated to lead to the conclusion that such a right exists. But this misleading tendency is overcome, I think, when we consider its entire context. My concurrence in the conclusion reached on this point, I wish to be understood, was upon the proposition that the equity of the bill is based upon complainant's right to compensation for the injury done his property abutting on the avenue, and not upon an injury to his supposed property interest in the avenue itself.

The other questions raised on the record are sufficiently clearly dealt with, so there is no need of discussing them further.

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Bill to Enjoin Trespass and Prevent Cutting of Trees Held Under Lease.

(Decided June 30th, 1906. 41 So. Rep. 816.)

1. *Equity; Cross Bill; Propriety.*—A cross bill is proper and allowable whenever it becomes necessary to do justice between the parties and adjust all the equities between them growing out of and connected with the subject matter of the original bill.

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2. *Same; New Issues.*—In a suit in equity new issues relating to the subject matter of the original bill, may be brought forward by cross bill.
3. *Same; Elements.*—It is not necessary that a cross bill should show any grounds of equity or ask equitable relief, as against the complainant in the original bill. It is sufficient if the matters therein relate to the subject matter of the original bill, in which case purely legal claims may be presented by cross bill.
4. *Same; Affirmative Relief; Answer; Cross Bill.*—Affirmative relief cannot be obtained under an answer. It must be asked by cross bill.
5. *Same; Recoupment; Damages.*—The bill alleged the leasing of certain lands for turpentine purposes from respondent, the violation of the lease by respondents in cutting down the trees that had been boxed and were being used for turpentine purposes, praying damages for the trespass already committed and an injunction to restrain further trespass. Respondents filed their cross bill alleging that they purchased the land for the timber thereon, and leased it to complainants for turpentine purposes and that complainants had violated the terms of the lease by boxing trees smaller than 10 inches at the butt, a large per cent of which had died and others blown down, causing loss to respondents of a named sum, and claiming judgment therefor. Held, the damages sought to be recouped were of the same class as those claimed in the original bill, and therefore relating exclusively to the subject matter of the bill.
6. *Same; Clean Hands.*—The complainants having violating the terms of the lease by boxing trees under 10 inches at the butt, they were not entitled to relief in equity under the contract of lease against the lessors for their alleged trespass in cutting and hauling away boxed trees for lumber.

APPEAL from Covington Chancery Court.

Heard before HON. W. L. PARKS.

Bill by the Ashe-Carson Company against R. A. Bonifay and others, in which defendants filed a cross-bill. From a decree sustaining defendants' pleas to the bill, discharging an injunction on defendants' cross-bill, and overruling a motion to dissolve an injunction granted defendants on their cross-bill on the coming in of the answer to the same, complainant prosecutes separate appeals.

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The bill alleges the leasing to appellant by appellees of certain lands for turpentine purposes, and the right to go upon the same, erect stills, box the pine trees, procure the crude turpentine, and manufacture the same into spirits of turpentine and into rosin. It alleges that appellees have gone upon the lands in violation of the lease and cut down and hauled away a lot of trees that were boxed and being used for turpentine purposes, and that they had threatened to continue to do so. It prays damages for the trespasses already committed and to prevent further commission of the trespasses complained of. The appellees filed certain pleas and cross-bills, setting up a violation of the lease contract by appellant, in that, they had boxed trees on said land of small diameter than was permitted by the terms of the contract, and that as a result of the same a large number of their valuable pine trees, not for turpentine purposes, but valuable for lumber in which business they were engaged, had died or blown down, and that other large numbers would likely die or be blown down, alleging their damages in a large sum, which they offered to set off or recoup against the damages set up in the original bill; and the cross-bill also prays injunctive relief. The other facts sufficiently appear in the opinion.

The first appeal is prosecuted from a decree of the chancellor holding appellees pleas to the original bill to be good. The second appeal is taken from a decree of the chancellor to discharge the injunction issued on appellees' cross-bill, and the third appeal is taken from a similar order overruling the motion to dissolve the injunction granted appellees on their cross-bill on the coming in of the answer to the same.

POWELL, ALBRITTON & ALBRITTON and STALLINGS & REID, for appellant.—The pleas are clearly insufficient.—1 Pomeroy's Eq., § 399. A cross bill cannot be filed before the filing of an answer to the bill.—*Lehman Durr & Co. v. Dozier*, 78 Ala. 235. The pleas being insufficient could not take the place of an answer, and hence, could not authorize the filing of the cross-bill.

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Independent matters not germane to the issue cannot be set up by cross-bill.—*Tutwiler v. Dunlap*, 71 Ala. 126; *O'Neill v. Perryman*, 102 Ala. 523; *Continental L. Ins. Co. v. Webb*, 54 Ala. 688. All the demands set up by a way of cross-bill are for damage growing out of tort which are not available in equity.—*Cotton v. Scott*, 97 Ala. 447; *Chambers v. Wright*, 52 Ala. 444; *Jones v. Brevard*, 59 Ala. 499; *Goldthwaite v. National Bank*, 67 Ala. 549; *Watts v. Sayre*, 76 Ala. 397. In the absence of an averment that complainant is insolvent cross complainant cannot maintain as a matter of set off the boxing of trees under size.—*Whitfield v. Riddle*, 78 Ala. 99.

FOSTER, SAMFORD & CARROLL, for appellee.—Cross bills can bring forward no new subject matter not presented in the original bill but they can raise new issues relating to that subject matter and may be resorted to to secure such moulding or modifying complainant's relief so as to do full justice to the parties.—*Davis v. Cook*, 65 Ala. 617; *Nelson v. Dunn*, 15 Ala. 501. And on these same authorities cross complainant is not bound to show any grounds of equity in the cross-bill to support the jurisdiction of the court as against original complainant.

Cross complainant may set off any matter which would be proper matter of set off at law.—*Gafford v. Proskauer*, 59 Ala. 267. But the pleas are not pleas of set off; they are recoupment.—*Grisham v. Bodman*, 111 Ala. 200. A recovery over may be had on plea of recoupment.—§ 3734 code 1896; *Ewing v. Snow*, 83 Ala. 333. Adequacy of remedy at law has no application to cross bills.—*Davis v. Cook, supra*; *Nelson v. Dunn, supra*. The facts made by the cross-bill would entitle to an injunction if filed as an original bill.—*Wadsworth v. Goree*, 96 Ala. 222-227.

HARALSON, J.—It is well said that “a cross-bill is proper and allowable whenever it is necessary to do complete justice between the parties, and to adjust all the equities between them connected with the subject

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matter of the original bill. New issues in relation to the original matter may be brought forward. As against the plaintiff in the original bill, it is not always necessary that the cross-bill should show any ground of equity or ask equitable relief. No affirmative relief can be obtained under an answer. It requires a cross-bill to do that."—*Davis v. Cook*, 65 Ala. 617; *Morton v. N. O. & Selma Railway Co.*, 79 Ala. 591; *Whitfield v. Riddle*, 78 Ala. 104; *Nelson v. Dunn*, 15 Ala. 501.

Inadequacy of legal remedies in the first place is not an essential element of a cross-bill. It must relate to the subject matter of the original bill. If it does, it brings forward purely legal claims.—*Davis v. Cook*, *supra*; *Stevens v. Hertzler*, 114 Ala. 564, 578, 22 South. 121; *Wadsworth v. Gorce*, 96 Ala. 227, 10 South. 848; *Nelson v. Dunn*, 15 Ala. 502.

"The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is, that he may owe the plaintiff what he claims, but that a part or the whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him, * * * while on a plea of recoupment, a defendant may deduct from plaintiff's claim all just demands or claims owed by him, or judgments made by him in the very same transaction, or even in other but clearly connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action so much as he seeks, and not that he ought not to pay plaintiff so much, because on another cause of action the plaintiff owes him."—2 Parsons on Contracts, pp. 562, 563.

In *Grisham v. Bodman*, 111 Ala. 200, 20 South. 515, we said: "Recoupment is not merely a cross action, as is set-off; the plea does not confess the indebtedness counted on in the complaint and bring forward a counter indebtedness from the plaintiff to the defendant, as does the plea of set-off; but its proposition is that plaintiff's claim is based upon a particular contract or trans-

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action, that to entitle the plaintiff to the sum he claims it was upon him to comply with certain obligations of the contract or to discharge certain duties which the law imposed upon him in the making or performing of the contract, that he has failed to comply with such obligations or to discharge such duties and that thereby the defendant has been so damaged in the particular transaction, or in respect of the particular contract, that the plaintiff is not entitled to recover; or, in other words, that the plaintiff has no debt or a less debt than he claims, as the case may be, against the defendant."

"It is not necessary that the opposing claims should be of the same character, but it is sufficient if they arise out of the same transaction or relate to the same subject-matter, and are susceptible of adjustment in one action. Within this principle a claim originating in a contract may be recouped against one founded in tort."—25 Am. & Eng. Ency. Law (2d Ed.) 558, and authorities there cited.

Applying these principles to the case in hand, it plainly appears, that the cross-bill was well filed. The damages sought to be recouped are of the same class as those claimed by the complainant against defendants. The cross-bill, under which they are claimed, relates exclusively to the subject-matter of the bill and things connected therewith.

The plaintiffs in the cross-bill bring forward a number of instances in which the complainant in the original bill is violating his contract with them in respect to the lease of the lands for turpentine purposes. It is averred that complainants in the cross-bill purchased the lands they leased to the original complainant, for the purpose of using the pine timbers thereon to be manufactured by them into lumber for the market, a fact which was well known to said complainant, and that the destruction of the timbers or trees upon said lands would prevent them from being able to use the same for that purpose; that said contract of lease expressly provides, that no pine tree shall be boxed or worked for turpentine, which is smaller than ten inches

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at the butt, and yet in violation of their contract, complainants have boxed and worked six thousand trees of a diameter smaller than ten inches at the butt; that twenty-five per cent. of these trees have either died or blown down from this cause, and that at least twenty-five per cent. more of such trees will die or be blown down by reason of being thus boxed; that if complainants are permitted to continue to work such trees for turpentine for another year, practically all the trees of that size on said land will die or blow down, or be so stunted in their growth as never to be of any more value; that by reason of this violation of said agreement by complainants, as above stated, complainants in the cross-bill have sustained a loss of, to-wit, \$6,000 in the value of said trees.

It is further averred that boxes for turpentine purposes should be cut in the base of a tree and not above it, and if not thus boxed, it has a tendency to weaken the tree and cause it to die; and especially is this true, if more than one box is cut to the tree, which is of 10 inches in diameter; that complainants have disregarded their duty in this respect, and have caused the trees to be boxed from 4 to 12 inches too high, which resulted in causing a great many of the trees to die and blow down to the damage of defendants in, to-wit, \$4,000; that boxes in the trees should not be cut deeper than three inches into the body of the tree, a fact well known and understood by complainants, and in violation of this rule, they cut them from 4 to 5 inches deep, causing great numbers of them, to-wit, twenty per cent., to die and be blown down from such causes, to the damage of defendants, in to-wit, the sum of \$4,000.

It is further alleged that complainants have streaked the boxed trees in a manner described, which is in violation of the custom and rules on the subject, which has caused damage to the defendants in the sum of, to-wit, \$2,500.

It is further alleged, that it is the purpose and intent of complainants to work said boxes as stated notwithstanding respondent's repeated protests against it;

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that if permitted to continue such violations of duty, the damage that will result in the future to defendants will be irreparable, in that they will be deprived of the use and enjoyment of the privilege of sawing said trees into lumber; and the damages to them are not susceptible of ascertainment in a court of law, and they are without remedy except by injunction from the court of equity.

Other violations of the duty of complainants in the manner of performing their contract and lease, are set out, but these, perhaps, are not necessary to be here stated, as those that are specified will subserve the purpose in hand.

An injunction is prayed against these violations of cross-complainants' rights, and for a reference to the register, to ascertain and report as to these several matters, and the damages occasioned to cross-complainants, therefrom, etc.

The defendants in the original suit, filed five pleas, in each of which is separately set up the alleged violations by complainants of their said contract of the lease of said lands, such as have been before noticed, each alleging that for such violations of said contract, and the wrongs done the defendants, complainants have not come into court with clean hands and ought not to be allowed to have and maintain their cause of action against respondents.

Separate motions were made by complainants to dismiss the cross-bill for want of equity; for the same reason to dissolve the injunction granted thereon, and to discharge the same. These motions, together with a demurrer to the bill, and one to test the sufficiency of the pleas, were duly submitted to the chancellor for decrees in vacation, and separate decrees were rendered thereon overruling the demurrer, sustaining the pleas, overruling the motions to dissolve and discharge the injunction theretofore granted, and from the three last named decrees, the appeals are prosecuted, and errors are separately assigned.

It is a fundamental principle of equity, that he who seeks equity must do equity, and he who comes into

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equity must come with clean hands. "Whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."—1 Pom. Eq. Juri. (2d Ed.) §§ 397, 399.

"He who does iniquity, shall not have equity."—11 Am. & Eng. Ency. Law, 162, 163.

The pleas as contended by appellees, fully set up the facts that complainant in the original bill has violated the contract in respect to its express provisions, and also in respect to the objections imposed by law, growing out of the contract in the several matters as shown therein. He is, therefore, in no condition to invoke the aid of an equity court.

It should be added, that the court below, on application of cross-complainants, modified the injunction granted to complainants, on the filing of the original bill. It appears, there was no error in either of the decrees appealed from, and they are severally affirmed.—*Coleman & Davis v. Elliott*, (Ala.) 40 South. 666.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

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Bill to Abate Nuisance.

(Decided July 6th, 1906. 41 So. Rep. 907.)

Highways; Obstructions; Remedy of Private Persons; Injunctions.

—The owner of private property abutting on a street is entitled to have a public nuisance abated as one suffering special damages therefrom, who is compelled to take a circuitous or

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round about way along other streets in travelling between his property and the markets and intercourse with the outside world by reason of the stopping up of the abutting streets by dumping slag therein.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

This was a bill by Johnson to abate a public and private nuisance arising from the obstruction of certain streets in the city of Birmingham by the dumping of slag into them by the Sloss-Sheffield Steel & Iron Co. The case made by the bill together with the facts are sufficiently stated in the opinion of the court.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellants. In order for a private individual to maintain a bill for the purposes sought in the case at bar, it must be averred and shown not only that the complainant sustains some special injury to himself, distinct and independant of a general injury to the public, but it must also be averred and shown that the injury will be irreparable, or will be such that a complete compensation therefor cannot be obtained in a single action at law.—*Dennis v. M. & M. R. Co.*, 137 Ala. 649. The case at bar is on all fours in principle with the case just above cited, and in that case the following cases are cited.—*Keller v. Bullington*, 101 Ala. 267; *Bolling v. Crook*, 104 Ala. 130.

CABANISS & WEAKLEY, for appellee. The right of complainant to maintain this bill is clearly established by the following cases.—*Roberts v. Matthews*, 137 Ala. 533; *Cabbell v. Williams*, 127 Ala. 320; *Whaley v. Wilson*, 112 Ala. 627; *Jones v. Bright*, 140 Ala. 268.

TYSON, J.—This is the case of a bill filed by the appellee to abate a public and private nuisance arising from obstructing streets in the city of Birmingham by dumping therein slag from a furnace. The appellant demurred to the bill, and, the demurrer being overruled, this appeal is prosecuted to reverse the decree of the lower court.

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The complainant is the owner of a block of city property, which, it seems, is east of the alleged obstructions placed in the streets by the appellant; and the allegation making out the public nuisance is that the streets are, and long have been, dedicated to public uses as highways, and that the appellant by dumping slag therein totally obstructs the use thereof. The allegation, to give the appellee a standing in court to have this public nuisance abated, is that he is the owner of the property, an entire square, in the vicinity, and that the obstructed highways are streets leading from his property to the city of Birmingham and are the direct way for travel, and that by the obstructions he is deprived of the use of this direct route and is compelled to take a circuitous one in to other streets to the north or south of the obstructions. It is conceded that the facts alleged make out a public nuisance, and the only point at issue is whether they show such a peculiar injury to the complainant below as to give him a standing in court.

The general rule is that a private individual, who suffers no damage different from that sustained by the public at large, has no standing in court for the abatement of a public nuisance; but, if he sustains an individual or specific damage in addition to that suffered by the public, he may sue to have the same abated if the remedy at law is inadequate.—*Rosser v. Randolph*, 7 Port. 238, 31 Am. Dec. 712; *Columbus v. Whiterow*, 82 Ala. 190, 3 South. 23; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 9 L. Ed. 1012; 3 Notes U. S. Rep. 710; *State of Penn. v. Wheeling B. Co.*, 13 How. (U. S.) 518-564, 14 L. Ed. 249; *In re Debs*, 158 U. S. 587 et seq., 15 Sup. Ct. 900, 39 L. Ed. 1092; *Jones v. Bright*, 140 Ala. 268, 37 South. 79. This proposition is not denied, but it is insisted that no special damage is shown in this case to the complainant below, and that if such damage is shown the remedy at law is adequate in a suit for damages. As to special damages, the rule is that the injury, to be special, must be one different in kind, and not mere degree, from that suffered by the general public from the act complained of.—*Bigley v. Nunan*, 53 Cal. 403; *Crowley*

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v. Davis, 63 Cal. 461; *Decker v. E. S. & N. R. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Gundlach v. Hamm*, 62 Minn. 42, 64 N. W. 50; *High on Injunctions*, § 589.

The situation shown by the bill is that the nuisance is the obstruction of the two streets bounding the complainant's block of land on the north and south, and extending directly into the city of Birmingham; the obstruction being two blocks distant in a westerly direction from complainant's property, and compelling all travel between his property and the city to take a circuitous route north or south of the two obstructed streets into other streets leading into the city, instead of pursuing the direct course along Second and Third avenues, which are the obstructed streets. So the question is whether forcing the owner of land out of his direct public street or road into a circuitous route in his commerce and intercourse with the outside world is a peculiar or special injury to him, not suffered by the general inhabitants of the state, county or city.—*Spencer v. London & Birmingham Co.*, 8 Sim. 198. The statement of the proposition seems to give the affirmative answer to the inquiry. If the direct and usual route of travel may be obstructed, there could certainly be no reason why the indirect routes might not also be closed one by one, until the unlawful and criminal invasion of public roads put the unfortunate owner's property in a *cul-de-sac*, compelling a day's time instead of a few moments of time, in going to business, church or market. An individual might be entirely inclosed, and the value of his property destroyed, without affecting the public. The injury is thus clearly individual and special. In the case of *State of Penn. v. Wheeling Bridge Co.*, 13 How. (U. S.) 518. 14 L. Ed. 249, the state of Pennsylvania entirely as an individual filed its bill to abate the obstruction by a bridge of a public waterway in the state of Virginia which interfered with the general commerce and travel feeding its connecting railroads and canals; and after elaborate consideration relief was granted on the ground that the bridge, though a public, was also a private, nuisance, on account of the special injury to the complainant. There can be no question that the obstruction of a route of communication

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with the public community enjoyed by a property owner is a private or special injury, although it may be at the same time a public nuisance, entitling the injured party to appeal to a court of chancery for protection if the injury is substantial, and the remedy at law is not adequate.—13 How. (U. S.) 567, 14 L. Ed. 269; *Jones v. Bright*, 140 Ala. 268, 37 South. 79.

The only question, then, is whether or not the obstruction of the streets in this case could be fully and adequately remedied by an action at law for damages. This question seems to be precisely decided in the case of 13 How. 562, 14 L. Ed. 267, where the court, speaking of the obstruction of a public waterway changing the line of transportation over the complainant's railroad and canals, says: "This injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong the compensation could not be measured or ascertained with any degree of precision. The effect (of the injury) would be, if not to reduce the tolls on these lines of transportation, to prevent their intercourse with the increasing business of the country." The obstruction of the streets in this instance is continuing, but may be temporary or permanent, and the injury to the complainant, whether embracing the present or prospective injury to his property, is entirely incapable of any precise measurement. These obstructions might direct the line of city development away from the plaintiff's property. There is thus no full, adequate, and complete remedy open to the plaintiff for his individual injury, save in this court.—*Roberts v. Mathews*, 137 Ala. 523, 34 South. 624, 97 Am. St. Rep. 56; *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405; *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Jones v. Bright*, 140 Ala. 268, 37 South. 79; *City of Georgetown v. Alexandria Co.*, 12 Pet. (U. S.) 98, 9 L. Ed. 1012; *State of Penn. v. W. B. Co.*, 13 How. (U. S.) 567, 14 L. Ed. 269; *Stetson v. Faron*, 31 Am. Dec. 123, and note; *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London & B. Co.*, 8 Sim. 193.

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There was no error in the decree of the lower court, and therefore it is affirmed.

All of the justices concur, except WEAKLEY, C. J., not sitting.

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Bill for Injunction to Restrain Construction of Telephone Line.

(Decided May 17th, 1906.—41 So. Rep. 292.)

1. *Injunction; Temporary Injunction; Motion to Dissolve; Evidence.*—Ex parte affidavits and copy of deed in support of complainant's title to the land, on the hearing of a motion to dissolve the temporary injunction on the coming in of the answer, although the sworn answer denies title of complainant to the land, may not be used to support complainant's title.
2. *Same; Notice.*—Where extrinsic evidence is proposed to be used to support the allegations of the bill, or the denials of the answer, on the hearing of a motion to dissolve an injunction, the offer to do so must be seasonably made and timely notice thereof given.
3. *Trusts; Suit by Trustee; Nature of Title; Bill.*—A bill filed by trustee to restrain the construction of a telephone line across land, which alleges that complainant was trustee for certain named persons, who are alleged to own the land, is fatally defective in not alleging facts to show that the trust is an active one, and not a mere naked trust, and that the complainant had the legal title.

APPEAL from Cullman Chancery Court.

Heard before HON. W. H. SIMPSON.

Suit by S. Roman, as trustee, etc., against the Long Distance Telephone & Telegraph Company. From a decree sustaining a motion to dismiss the bill and dissolve a temporary injunction, complainant appeals.

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The allegations by the bill in this case were as follows: (1) Residences and ages of the parties; (2) that the complainant, as trustee for Lehman Bros. and Ignatius Pollak, is the owner of and in possession of the following described land situated in Cullman county, Ala. (here follows a description of the land), and that said lands are very valuable; (3) defendant is engaged in the construction of a telephone line on and across the lands of complainant above described without offering to pay complainant any just compensation therefor, and without having instituted any judicial proceedings for the purpose of condemning said lands, and that its servants and agents were digging holes, erecting poles, etc., on said land. And it prays for an injunction restraining the construction. The defendant filed a sworn answer, denying the ownership or possession of the land in said Roman as trustee, and setting up ownership in other various parties. It sets up the acquirement by defendant of the right to construct and maintain the telephone line where it is being constructed and maintained by virtue of permission from the owners of the land. The defendant further moved for dismissal of the bill and a dissolution of the injunction for want of equity in bill, and because the sworn denials to the answer go to and controvert all the material averments of the bill. Defendant also demurred to the bill because it does not sufficiently appear whether said Roman filed the bill in his individual capacity or as a trustee for Lehman Bros. and Ignatius Pollak, and because the bill is filed by Roman in his individual right and all the rights shown in the complainant to the lands involved is in his capacity as a trustee, and because said bill does not show the nature of the trust held by said Roman over said lands, whether it be a naked trust or an active trust, and because of a nonjoinder of parties plaintiff, in that Lehman Bros. and Ignatius Pollak are shown to be the beneficial owners of said land and are not made parties to the suit, and because the bill does not show that the land has been damaged or will be damaged by the construction of the telephone line mentioned in said bill. The defendant demurred to the verification of the bill be-

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cause said verification does not show that thte affiant had any knowledge of the facts stated in the bill, and it does not show any sufficient reason why it was not verified by the complainant. The verification of the bill was made by D. A. Fuller, who says that he is a duly authorized agent of the complainant and has authority to make the affidavit; that the complainant resides at Montgomery and is not present to make the affidavit, and will not have time to make the same in time to prevent the wrongs complained of in said bill, and that the matters and allegations contained in the bill of complainant are true. On a hearing on demurrers and motions to dismiss the bill and to dissolve the temporary injunction, the chancellor granted the motion, sustaining the demurrers, and dissolved the injunction.

JOHN C. EYSTER and F. E. ST. JOHN, for appellant.—The affidavits and the deed should have been admitted.—*H. A. & B. R. Co. v. Birmingham R. & E. Co.*, 113 Ala. 239; *Henry v. Watson*, 109 Ala. 339. The court erred in dissolving the injunction. Under our constitution no property can be taken or injured in the exercise of the power of eminent domain until compensation is first made to the owner.—*City Council of Montgomery v. Lemle*, 121 Ala. 609; 131 Ala. 663.

BROWN & KYLE, for apepllee.—After submission of a cause all parties are precluded from offering further evidence without having the submission first set aside and obtaining leave of court to that end.—*Bernard v. Davis*, 54 Ala. 565; *Hill v. Reifsnider*, 39 Md. 429; *Wilkinson v. Buster*, 115 Ala. 580; *McMinny v. Carter*, 116 Ala. 390. On motion to dissolve, the answer has no weight as evidence unless verified.—*Rainey v. Rainey*, 35 Ala. 282. Ex parte affidavits are not receivable to contradict the averments of the sworn answer on motion to dissolve the injunction, except in cases to stay waste, to restrain a trespass or to abate a nuisance.—*Harrison v. Maury*, 140 Ala. 523; *Barnard v. Davis*, 54 Ala. 565; *Long v. Brown*, 4 Ala. 622. Under the allegations of the bill the

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trust was a mere dry trust and the cestui que trust should have been joined.—§ 1027, code 1896; *Jordan v. Phillips*, 126 Ala. 561; *Jordan v. Spear*, 131 Ala. 414; *Robinson v. Pearce*, 118 Ala. 273. There is no question of eminent domain in this case, as the placing of poles and wires do no damage.

DOWDELL, J.—The appeal in this case is taken from the decree of the chancellor sustaining the demurrer to the bill and dissolving the temporary injunction. It appears from the record that the cause was submitted in term time for decree in vacation on the demurrer to the bill and on motion of respondent to dissolve the temporary injunction, and by agreements of parties the 7th day of October, 1905, at Decatur, Ala., was set as the time and place for the argument of the cause by counsel. The respondent by its sworn answer denied the title and ownership of the complainant of the lands described in the bill. At the hearing on October 7th the complainant, in support of the averments of the bill, offered certain affidavits and a copy of the deed made by the register in chancery to the complainant. The respondent objected to the introduction on the hearing of said affidavits and said copy of deed. The chancellor sustained the objection of the respondent and refused to consider the affidavits and copy of deed, and, on the denials in the sworn answer, dissolved the injunction. As stated above, the respondent, in its sworn answer, denied the title and ownership of the complainant. Under the rule laid down in *Barnard v. Davis*, 54 Ala. 565, which is but a reaffirmance of the rule of practice in injunction cases, it was not competent for the complainant, on the hearing of the motion to dissolve the temporary injunction on the denials in the sworn answer, to support the averments of his bill as to title and ownership by ex parte affidavits. Moreover, if it had been competent to do so, the offer to do so here was not seasonably made and on timely notice.

While the ruling on the demurrer is assigned as error, this assignment is not insisted on in argument, and for that reason we might decline to notice it; but, as the ques-

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tion might be again raised on an appeal from the final decree, we deem it proper for that reason to consider it. The bill is not sufficient in its statement as to the trusteeship of the complainant. For aught that appears, the trust may be a naked trust, without any duties for the trustee to perform. In such case the legal title of the property conveyed in trust would vest in the cestui que trust, and the alleged trustee would not be the proper party to maintain the bill. On the other hand, if it should appear that the trust created was not a naked trust, but an active one, the cestui que trust would not be a necessary party to the bill, as no question in the character of the bill here filed would arise between the trustee and the cestui que trust. The trustee, being clothed with a legal title and with active duties to perform, would be authorized, as it would be his duty, in his own name as trustee to protect the property of the trust by legal proceedings as well as otherwise.

We find no error in the record, and the decree appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Bill to Enjoin Construction of Telephone Line Until Compensation For the Damage to Land is Paid.

(Decided July 6th, 1906—41 So. Rep. 1003.)

1. *Eminent Domain; Use of Highway for Telephone Line.*—The construction of a telephone line is not an additional burden or servitude on the land entitling the abutting owner to compensation. (Tyson & Denson, JJ., dissent.)
2. *Injunction; Jurisdiction; Remedy at Law.*—If the owner of land abutting on a highway is entitled to compensation for cutting trees on the land, his remedy at law is adequate, and he is not entitled to an injunction.

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APPEAL from Limestone Chancery Court.

Heard before HON. W. H. SIMPSON.

Bill by T. M. Hobbs v. Long Distance Telephone and Telegraph Co., to prevent erection of poles and wires upon and across his land and for damages for having done so. The allegations of the bill and the other pleadings are sufficiently stated in the opinion of the court.

W. R. WALKER, JAMES HORTON, JR., and H. C. THATCH, for appellant.—A telephone line on a public highway is an additional burden or servitude for which the abutting landowner is entitled to compensation.—106 Am. St. Rep. 233-268, see note; 27 Am. & Eng. Enc. Law (2nd Ed.) pp. 1008-1009; Lewis on Eminent Domain, § 131; Elliott on Roads & Streets, p. 534; I High on Injunctions (4th Ed.) p. 575; Keasbey on Electric Wires (2nd Ed.) pp. 119-120-121-122-123-124-125; Dillon on Munic. Corp., § 698 A.; Joyce on Elec. Law, § 321; Crosswell on Law of Elec., § 110; Randolph on Eminent Domain, § 407; *Postal Teleg. Cable Co. v. Eaton*, 62 Am. St. Rep. 390; *Eels v. Am. Telph. & Teleg. Co.*, 143 N. Y. 133, 25 L. R. A. 640; *Stowers v. Postal Telg. Cable Co.*, 9 So. Rep. 356, 24 Am. St. Rep. 290; *Chesapeake, etc. Teleg. Co. v. MacKenzie*, 74 Md. 36, 28 Am. St. Rep. 219; *Nichol v. N. Y. & N. J. Tel. Co.*, 72 Am. St. Rep. 666; *Am. Tel. & Teleg. Co. v. Smith*, 7 L. R. A. p. 200; *Board Trade Tel. Co. v. Barnett*, 47 Am. Rep. 453; *Western U. Teleg. Co. v. Williams*, 86 Va. 696, 8 L. R. A. 429; *Donovan v. H. D. Allert, et al.*, 58 L. R. A. 775; *Am. Tel. & Teleg. Co. v. Pearce*, 71 Md. 535; *Broom v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. Rep. 851; *Dusenbury v. Mut. Tel. Co.*, 11 Abb. N. Cases 440; *Smith v. Central, etc. Tel. Co.*, 2 Ohio Cir. Ct. 259; *Willis v. Erie, etc. Co.*, 37 Minn. 347; *Atl. etc. Tel. Co. v. Chicago, etc. R. R. Co.*, 7 Biss 158; *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893; *Pacific Cable Tel. Co. v. Irvine*, 49 Fed. Rep. 113; *Kester v. Western U. Teleg. Co.*, 108 Fed. Rep. 926; *Kincaid v. Ind. Nat. Gas Co.*, 8 L. R. A. 602, 24 N. E. 1026; *Spokane v. Colby*, 16 Wash. 610, 48 Pac. Rep. 248; *Kreuger v. Wisconsin Tel. Co.*, 106 Wis. 96, 50 L. R. A.

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298; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724; *Bronson v. Albion Telph. Co.*, (Neb.) 60 L. R. A. 426; *Met. Telph. & Teleg. Co. v. Colwell Lead Co.*, 67 How. Pr. 365.

Analogous cases hold that the construction of a telegraph line along the right of way of a railroad is taking of the company's land, for which it is entitled to compensation.—*M. & O. R. R. Co. v. Postal Cable Co.*, 120 Ala. 21; *N. O. & M. & T. R. R. Co. v. So. & A. Tel. Co.*, 53 Ala. 212; *So. R. Co. v. So. & Atl. Teleg. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Western U. Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Atl. & P. Teleg. Co. v. Chicago R. I. & P. R. Co.*, 6 Biss. 158; Lewis on Eminent Domain, § 1888; Mills on Em. Domain, § 55.

The erection of a telegraph line on a right of way of a railroad is an additional servitude for which the abutting owner is entitled to compensation.—*Am. Telph. & Teleg. Co. v. Smith*, 7 L. R. A. 200, and authorities there cited; *Am. Telph. & Teleg. Co. v. Pearce*, 71 Md. 535, 18 Atl. Rep. 910.

ERLE PETTUS, M. K. CLEMENTS and E. W. GODBY, for appellee.—A telephone line is not an additional burden on the fee.—*Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Lockhart v. Craig St. R. R.*, 139 Pa. St. 419; *People v. Eaton*, 10 Mich. 208, 24 L. R. A. 721; *Cater v. N. W. Tel. Co.*, (Minn.) 28 L. R. A. 310; *Marwell v. Cent. Dis. & Printing Tel. Co.*, 51 W. Va. 127; *Julia B. & L. Ass'n*, 88 Mo. 258; 57 Am. Rep. 398; *Frazier v. E. T. Tel. Co.*, Tennessee (In Manuscript); *Magee v. Overshiner*, 150 Ind. 127; *McCain v. Tel. Co.*, 52 L. R. A. 671; *Herschfeld v. Rocky Mt. Bell Tel. Co.*, 29 Pac. 883; *Cumberland T. & T. Co. v. Arvitt*, 85 S. W. 205; *Kirby v. Citizens Tel. Co.*, 97 N. W. 4; *N. Y. Tel. Co. v. Keesey*, 6 Am. Elec. Cases, 116.

SIMPSON, J.—This was a bill filed in the chancery court by appellant (complainant) against appellee (defendant) alleging that defendant was engaged in the construction of a telephone line across certain lands

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owned by complainant, and seeking to enjoin further work on the same until payment should be made to the complainant, as compensation for damages to said lands. The defendant filed an answer denying the allegations of the bill, but alleging that it was engaged in constructing said line along the margin of a public road which runs through complainant's land, making as an exhibit; a map which shows the location of said line, showing that six trees on the line and a little underbrush will be cut, which, it alleges, are practically of no value, and alleging that when cut, the same will be left on the land for complainant. Demurrers were also filed to the bill and a motion to dismiss for want of equity. A preliminary injunction was granted, and subsequently the chancellor overruled the demurrers, and motion to dismiss the bill, and dissolved the injunction, and it is from this decree that the appeal is taken by the complainant. A cross-appeal is taken by the defendant, but subsequently dismissed by the cross-appellant, so that the only question raised is the correctness of the chancellor's decree in dissolving the injunction.

While, in the formative period of our system of laws, the courts were partly judicial and partly quasi legislative, meeting each case on its own merits, and thus building up the customs which became the law; yet the principles of the law came to us in their entirety, and, under our written constitutions, it is a cardinal principle that the judicial and legislative departments shall be entirely separate. Nevertheless, it has been true that, in this wonderful age of inventions, the burden rests upon the courts continually of applying the principles of the law to situations and complications of human affairs hitherto undreamed of, and it sometimes becomes a matter of great difficulty to determine just how to preserve those principles and yet meet the demands of justice. Since the days of the Cæsars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports

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could be speedily brought to the capital, and the interchange of commerce promoted. The laws of congress have provided for post roads, etc., before the telephone was known, provided for the same privileges for telegraph companies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of "post routes" and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to place. The rights of the abutting owners, and the question as to what is or is not an additional servitude, have furnished material for a vast number of conflicting decisions, so numerous and so conflicting that it would extend an opinion beyond all reasonable limits, to attempt an analysis of them, yet a careful examination of them will show a gradual development of the principles of the law, in order to accommodate them to the progress of events and the onward march of civilization.

Thus, even in as late and excellent a work as that of Judge Dillon on Municipal Corporation, the rights of surface railways on the streets, and the question as to whether they constitute an additional burden, are spoken of as unsolved problems. And in a note the wise words of Chief Justice Hale are quoted, in which he advises patience in solving these questions, and says: "Time is the wisest thing under heaven. * * * It discovers such varieties of emergencies and cases, and such inconveniences in things that no man would otherwise have imagined," and the author of the note goes on to remark, among other things, that "good fruit in the law, as in the natural world, is the product alone of patient cultivation." In a second note the then recent case of *Taggart v. Newport St. Ry. Co.*, (R. I.) 19 Atl. 326, 78 L. R. A. 205, is quoted, to the effect that an electric street railway, with its poles and wires, was not an additional servitude.—2 Dillon on Munic. Corp. § 734c, and notes.

On this subject, a recent writer states that the judgment of "substantially all of the courts of last resort in the United States," except New York, is that the "ordi-

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nary electric street railway with trolley wire," etc., is not an additional burden on a street.—Nellis on Surface Railroads, pp. 134, 135; Elliott on Roads & Streets (2nd. Ed.) pp. 754, 757, §§ 698, 699.

The progress of thought on this subject is succinctly stated in Joyce on Electric Law, § 341; Keasly on Electric Wires, §§ 124, 145, conclusion on p. 178.

On the subject of erection of poles for electric lighting, on streets, after some contrary decisions, the evident necessity is so great that it has come to be generally understood that it is not an additional burden, though there still remains, in the decisions and text-writers, the impression that it is saved by the fact that the light companies generally light the streets as well as private dwellings, and, now, a recent text-writer says: "The distinction, however, is not made with respect to pipes for lighting by gas. It seems to be now conceded that city streets may be used for gas pipes, without compensation to abutting owners, whether it be for the purpose of supplying private houses, or for the purpose of lighting the streets and public places. The pipes used for both purposes are generally the same; the purpose is, in a sense, necessary and general, and the streets are the most convenient, if not the only means of access. * * * The same conditions apply to the electric light. * * * If the purpose is a public purpose for which the streets may be used, it would seem that compensation could not be properly required for the mere occupation of the soil by a pole any more than by a gas pipe."—Keasly on Electric Wires, § 112, p. 139. Other writers have also called attention to the fact that the streets are constantly used for fire plugs, fire alarm stations, and other things necessary for the protection and good order of the city; yet no court would, for a moment entertain the idea that they are an additional burden, for which the abutter could claim compensation. The last-named writer, we think, suggests the practical solution of these matters, when he says: "It does not follow that the landowner is without redress, if poles be put up so as to interfere with his access, or even as to be inconvenient or unsightly, or if wires be hung so

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as to be dangerous or so as to prevent ready access in case of fire.—Keady on Elec. Wires, p. 139, § 113. "It might tend to a reconciliation of the cases and the adoption of a uniform rule, if the question of new burden were left on one side, and the attention were directed to the practical question whether or not the rights and privileges of the abutting owner * * * were affected."—Id. p. 177, § 145. "When the property is taken for a public road or street, although technically the fee remains in the abutting owner, yet he cannot interfere with the surface, and it would seem that, practically an additional burden, such as would, justify an action on his part should be something which either interfered with or made inconvenient his enjoyment of what remained to him in the land. As to obstructing the road, that would be a matter in which he had no greater right than the public generally, but if the new use impaired his proper use of his own property, in any manner, then, if it could be said to be a use not included within the original grant, it would be a matter for which he would be entitled to compensation."—Id. p. 153, § 124.

Judge Elliott says that "the owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage or the right of ingress and egress to and from the adjoining property."—Elliott on Roads & Streets (2d Ed.) p. 417, § 407.

The New Jersey court of chancery declares that "his right (the abutter on a public highway who holds the fee therein) is subordinate to that of the public and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest;" also (quoting from Justice Depue of New York Court of Errors and Appeals) "with respect to lands over which streets have been laid, the ownership, for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest."—*Halsey v. Railway Co.*, 20 Alt. 860.

Courts are not organized to decide academic questions, but to decide upon practical rights of the people, and rem-

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edy their real wrongs. It is in accordance with these principles that the courts have held that a steam railroad is an additional burden, because it renders the property of the abutting owner less habitable; while, as shown, the evident trend is to hold that electric lines are not. As said by the supreme court of Michigan: "When they do not interfere with the owner's access to and use of his land, we see no reason why they should be held to constitute an additional servitude."—Joyce on Elec. Law, § 336; *Detroit City Ry. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

We have indulged in these general remarks, because, as Mr. Cook says, on the subject of telegraph and telephone companies: "The decisions are in irreconcilable conflict."—3 Cook on Corp. (4th Ed.) § 933. And Mr. Keasly says: "It is not yet safe to predict which of the two views will finally prevail."—Joyce on Elec. Law, § 306.

Without referring to the cases, which will be found collated on both sides in the Tennessee case, to which we shall hereafter refer, our conclusion is that the public roads, when dedicated, were dedicated, not merely for travel on foot or on animals or in vehicles, but for locomotion by any means that should be afterwards discovered, and for communication between the citizens of the country, by carriers, on foot, or riding, or by any other means that might be found suitable and best. The mails could be sent over them in any way that was found most expeditious. If it had been found advisable to send the mails in metal boxes swung on wires far above the heads of the people, in place of in stages and by carriers, no one would have supposed it was an additional burden upon the abutting owner. So, if it is found better to string wires high above the roads and convey messages by that mysterious something which is in the atmosphere and which seems to be as exhaustless as the bounties of Providence, it is accomplishing one of the great purposes for which public roads are dedicated. Some of the cases have drawn a distinction between urban and suburban roads, but in regard to wires and posts there would be

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more reason for declaring them burdensome in a city (where they accumulate in such numbers as to interfere with the operation of engines in extinguishing fires) than in the country where there are but few and far away from houses. It has been said that "it is hard to distinguish between a rural and an urban street, and that the nature of a street changes insensibly from the former to the latter, and a rule of property which depends on such a shifting and indefinite distinction is not likely to prove satisfactory."—Kearly on Elec. Wires, § 103.

We may add that the uses of the telephone are as important in the country as in the city, and it does not take a prophet's ken to see that in the near future they are to perform an important part in bringing the rural districts within the beneficial enjoyment of city improvements. The argument of Justice Devens of the Massachusetts supreme court is satisfactory to us on this general subject, and we think that the qualification which we make, that if the abutting owner shows that there will be actual and substantial injury to his property, he is entitled to compensation, meets the objections made in the dissenting opinion.—*Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

This matter of the rights of the abutting owners has been recently considered by the supreme court of Tennessee in an opinion, a certified transcript of which is furnished us, and that court, after giving long lists of the cases on each side of the controversy, takes the ground that one important function of the streets and roads of the country is to furnish means of communication, and that the telephone is only a new and very important invention for accomplishing that end, and does not constitute an additional burden.—*S. J. A. Frazier and Wife v. East Tenn. Telephone Co.*, (Supreme Court of Tenn. September Term, 1905) 90 S. W. 620.

Coming to the question of injunctive relief: It will be borne in mind that the right is granted by statute to telegraph and telephone companies to construct their lines "along the margin of the public highways."—Code 1896, § 2490.

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This right is said to "depend either on whether such line constitutes an additional servitude entitling him to compensation (which we have held it does not) or whether his right of ingress or egress have been impaired, or whether, in some other way, he has been injured in his property rights. * * * Nor will an injunction be granted where the injuries are merely consequential, since a court of law is the proper tribunal in such a case."—Joyce on Elec. Law, § 1022.

The Court of Errors and Appeals of New Jersey says: "It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected, in limine by an interlocutory injunction, is in doubt, or where the injury which may result from the invasion of that right is not irreparable."—*Halsey v. Ry. Co.*, (N. J. Ch.) 20 Atl. 861; *Hagerty v. Lee*, 45 N. J. Eq. 255-256, 17 Atl. 826.

Our own court has expressed itself very strongly as to the absolute right of the state to control and use the public thoroughfares for all public purposes, and against the right to enjoin a public improvement authorized thereon.—*Perry v. N. O. M. & C. R. R.*, 55 Ala. 413, 28 Am. Rep. 740; *Western Ry. of Ala. v. A. G. S. Ry.*, 96 Ala. 272, 281, 11 South. 483, 17 L. R. A. 474.

In a more recent case, it has declared the absolute right of a municipal corporation to authorize a telephone company, in stringing its wires, to cut trees on the sidewalk, without liability to the abutting owner.—*Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930.

In this case it is the right of the public authorities to cut all the trees on the public roads or to authorize them to be cut, the abutting owner being merely entitled to the wood when felled. And, at any rate, even if the complainant had a right to compensation for the trees, his remedy at law is adequate and complete.

The decree of the chancery court is affirmed.

WEAKLEY, C. J., and HARALSON, DOWDELL, and ANDERSON, JJ., concur.

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TYSON, J.—I cannot concur in the view expressed by my brothers. I prefer to follow the lead of the great weight of authority holding that poles and wires of a telephone company erected along a public country highway is an additional servitude upon the fee for which the owner must be compensated. I do not regard it as necessary to repeat the reasons for this holding, since they are ably, and in my opinion, unanswerably stated in the cases upon which I rely. These cases may be found collated in note on pages 721, and 722 of 24 L. R. A.; note on pages 261-263 of 106 Am. St. Rep. See, also, Elliott on Streets, §§ 397, 400, *et seq.*; 2 Dillon on Muni. Corp. § 698a. We need not have apprehension of depriving people of the use of this quasi public utility by this holding. Indeed, in those states where the cases cited above maintained this principle, the telephone systems, urban and suburban, are far more extensive than in this. The requirement of telephone companies to pay just compensation to the owners of land adjoining the public country roads does not seem to have been an impediment in the way of their extensive construction and operation; but even if that requirement is an impediment, this could be no possible justification for depriving the owner of his constitutional guaranty.

DENSON, J., concurs in these views.

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Bill to Enjoin Obstruction of Street.

(Decided June 5th, 1906.—41 So. Rep. 468.)

1. *Dedication; Acceptance; Official Acts; Public Use.*—Acceptance of a dedication may be by formal acts of the municipal authorities or others authorized, or it may be inferred from long public use.
2. *Dedication; Platting and Selling Land.*—The platting of land showing streets and avenues and the selling of lots with re-

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ference to the plat and the streets and avenues thereon, when done by the owner, is a complete dedication of the streets and avenues.

3. *Same; Evidence of Dedication.*—The fact that a street appears on a map, which is referred to in some of several deeds to land in its vicinity, is not of its self equivalent to dedication.
4. *Same; Prescription; Evidence.*—Testimony that certain lands formed a street before it was fenced in, without more, is insufficient to show that it was used for such length of time as to become a public highway by dedication and acceptance.
5. *Same; Necessity of Acceptance.*—In order to render a dedication such, and irrevocable, it must be accepted.
6. *Pleadings; General Denial.*—It not appearing prima facie that certain allegations made in the bill were within the knowledge of respondents, a general denial of such allegations was sufficient to put in issue the allegations and require proof in support thereof.

APPEAL from Mobile Chancery Court.

Heard before HON. THOMAS W. SMITH..

This was a bill filed by the city of Mobile to enjoin respondents from obstructing the western end of Georgia avenue and to require them to immediately remove any obstructions therein placed. The second paragraph of the bill alleges that one Sage O. Butler in 1845, being then the owner of the land covered by said avenue, by deed dedicated the said avenue as a street 60 feet wide extending from Dauphin street, to Old Shell Road. Here follows a description of several deeds made by Butler to various parties. These deeds contain the following stipulation: "Also the right, title, and interest, being one undivided half of, in, and to the street adjoining said lands and known and called Georgia avenue; that is to say, so much of said street as adjoins the land hereby conveyed on the side of Dauphin street, said avenue being 60 feet wide and extending back from Dauphin street northwardly 670 feet, together with the right of compensation for said avenue from the corporation of Mobile, with the condition and stipulation that the said avenue shall be kept open as a public street." The third allegation of the bill is that pursuant to said dedication the said Georgia avenue was opened as a street 60 feet

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wide from Dauphin street to said Old Shell Road, and remained in use by public as such for a considerable period of time. In the answer the respondents entered a general denial of the truth of the allegation of the second and third paragraphs of the bill. The other facts sufficiently appear in the opinion. There was judgment denying relief, and the plaintiff appeals.

B. B. BOONE and R. W. STOUTZ, for appellant.—Prima facie the making of the map was a dedication requiring but the making of sales with reference thereto to become absolute and an irrevocable dedication.—*Roberts v. Matthews*, 113 Ala. 523; *Reed v. Birmingham*, 92 Ala. 339; *Avondale L. Co. v. Avondale*, 111 Ala. 523. The sale to Kimball with reference to the street was complete as an acceptance of the dedication to the public use.—Authorities *supra*. The public right to use the street is not barred by limitation.—*Reed v. Birmingham, supra*. After the dedication becomes irrevocable by the act of one or more individuals the municipality may then maintain a bill to keep the highway open.—*Stewart v. Conley*, 122 Ala. 179. No formality is necessary to the acceptance of a dedication.—*Stewart v. Conley, supra*; *Reed v. Birmingham, supra*; 13 Cyc. 465.

ERVIN & MCALEER, and WILLIAM J. YOUNG, for appellee.—Dedication of lands is a question of intention.—*Reed v. Birmingham*, 92 Ala. 345; *Gage v. M. & O. R. R.*, 84 Ala. 225.

There can be no evidence of the intention except the writings and the attendant circumstances.—*Reed v. Birmingham*, 92 Ala. 345.

Where recorded deeds of land or lots adjacent to a street or alley contain recitals or words which repel the idea of dedication, this is always a strong fact to rebut the presumption arising from the use of the street.—*Steele v. Sulliram*, 70 Ala. 594; *Gage v. M. & O. R. R.*, 84 Ala. 226.

There must be both a dedication and an acceptance of it.—*Evans v. Sav. & W. R. R.*, 90 Ala. 58; *Reed v. Birmingham*, 92 Ala. 344.

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ANDERSON, J.—The bill in this case can only be maintained upon the theory that the respondents are wrongfully closing or obstructing complainant's highway. The question therefore arises: Was the strip in controversy a public highway or a part thereof, when inclosed by the respondents? In order for the complainant to obtain relief, it is incumbent upon it to show that there was a dedication of this strip by the owner and an acceptance. Acceptance of the dedication may be either by a formal acceptance by the municipal or other authorities or may be inferred by long public use. So, too, would the platting of land by the owner, and dividing it off by streets and avenues, and selling lots with reference to a map defining and delineating the streets, amount to a complete dedication of the streets thereupon disclosed.—*Reed v. Birmingham*, 92 Ala. 339, 9 South. 161; *Evans v. Savannah & Western R. R. Co.*, 90 Ala. 54, 7 South. 758.

There is no evidence in this case of a formal dedication and acceptance of the street in controversy. Nor was the fact that Georgia avenue appeared on a map which was referred to in two of the deeds equivalent to a dedication. On the other hand, every conveyance introduced in evidence which mentions a map negatives the idea that this land was a part of a public street or that any lands were conveyed upon the strength of being bounded by a public street or avenue or a part thereof. The witness Gazzam testified: "My father dedicated Georgia avenue as thirty feet." This was not sufficient to show a dedication and acceptance of the land in controversy. Nor does the fact that this land formed a part of the street before Kimball fenced it in show that it was used by the public a sufficient length of time to become a public highway (*McDade v. State*, 95 Ala. 28, 11 South. 375), or that it was so used by the public as to amount to an acceptance of the dedication, if one was made. There may be express or implied dedications, but in either event there must be an acceptance, in order to make the dedication complete and irrevocable.

There is some evidence that the avenue was wider than it now is; but there is no evidence to show that this par-

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ticular part, or the other part even, was used and kept up as a public highway and for aught we know, it was a private way when fenced in by the respondents and by Kimball. It may be that there is a public highway now being kept up by the public, known as "Georgia Avenue"; but there is no proof that the part in dispute, though included within the 60 feet intended to be dedicated, was accepted or used as a part of a public highway. "It does not necessarily follow, because a part of the offer has been accepted, that the whole has been. If it is evident that only a part of the land dedicated is needed, or is of value to it, the acceptance will be held to extend only to the part improved or occupied by the public, and which has been clearly recognized as a public highway."—9 Am. & Eng. Ency. Law, 50; *Alton v. Meenwenberg*, 108 Mich. 629, 66 N. W. 571. There is no evidence that the strip in question was ever accepted, or that Georgia avenue had ever been used as a public highway, before this strip was detached.

The appellant contends that the general denial of paragraphs 2 and 3 of the bill is insufficient to raise an issue, and that the facts therein averred should be considered as admitted. We do not understand that the charges made in said paragraphs are prima facie within the knowledge of respondents.—*Moog v. Barrow*, 101 Ala. 209, 13 South. 665; *Smilie v. Siler's Adm'r*, 35 Ala. 88; *Grady v. Robinson*, 28 Ala. 289. If Georgia avenue was opened as a street 60 feet wide and used by the public it was as easy for complainant to prove the fact as it was for the respondents to negative the charge, and a general denial was sufficient to require proof of the averment.

The decree of the chancellor is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

[Howison v. Bartlett, et al.]

Howison v. Bartlett, et al.*Bill for Specific Performance of Contract.*

(Decided April 28, 1906. 40 So. Rep. 557.)

1. *Vendor and Purchaser; Contract; Description of Land; Parol Evidence.*—Where the contract for the sale of timber and lands described it as the “virgin growth, long leaf, yellow pine timber land and rights owned by party of first part,” in a given township and range, etc., edge of C. River, such description is sufficient upon which to admit parol testimony of the definite location of the timber and lands so described.
2. *Specific Performance; Description; Sufficiency.*—Where the description is such as to be capable of identification of the subject matter of the contract by parol testimony, such contract will be specifically enforced.
3. *Same; Complete Contract; Defenses.*—The option for sale of timber and lands contained the provision that, upon its ripening into a sale, the sale should be consummated on the same terms as those contained in a contract of sale of certain other lands, specifically referred to in the option. The said contract of sale provided a specific price per acre; that a survey should be made by a competent surveyor to be mutually agreed upon by both parties to the contract and the lands mapped and platted and the line sufficiently marked so as to distinguish the outside boundaries of the land. Held, that the provision of the contract that a surveyor be mutually agreed upon by the parties so that the lands might be surveyed and mapped and platted was not an essential element of the contract, but a mere incident, for the purpose of identifying the subject matter and determining the amount due under the contract; and a failure on the part of the parties to the contract to mutually agree upon a surveyor to do this work will not defeat a specific performance of the contract.

APPEAL from Bibb Chancery Court.

Heard before HON. THOMAS H. SMITH.

Bill for specific performance of contract filed by appellees against appellant, the facts of which sufficiently appear in the opinion of the court.

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PETTUS, JEFFRIES & PARTRIDGE, for appellant.—We insist first, that a contract, not complete in anything essential, or uncertain in anything essential, if it involve an interest in land (other than a lease for a year or less) is void under the statutes of fraud on objection taken.—*Alabama Mineral Land Company v. Jackson*, 121 Ala. 172; *South Ry. Co. v. Wythe*, 5 Degex M. & G. 880; *Street v. Ridley*, 6 Vez. 818; *Milnes v. Jerry*, 14 Vez. Jr. 400; *Cooper v. Hood*, 26 Bevan 293; *Bromley v. Jeffries*, 2 Vernon 415; *Nelson's Case*, supra, 96 Ala. 515; *Alba v. Strong*, 94 Ala. 163.

Second, that a contract, (whether or not subject to the statute of frauds) incomplete in any material part, cannot be specifically performed by decree of a court of equity.—Authorities supra.

The courts of equity cannot make a new contract for the parties and then decree a specific performance.—Authorities supra.

ELLISON & THOMPSON, for appellee.—The contract in question falls within the class in which the mode for ascertaining the price mentioned, but from the language of the stipulation it is regarded as a non essential, and is something by way of suggestion so that the agreement is really to sell for a fair price.—*Jackson v. Jackson*, 1st S. & G. 184; *Gregory v. Mighill*, 17 Ves. Jr. 328; *Smith v. Peters*, 20 Eq. Cases 511; *Coles v. Peck*, 96 Ind. 331; Pomeroy on Specific Performances, p. 213. General descriptions of land does not render the deed indefinite.—*Bass v. Gilliland*, 5 Ala. 765; *Chambers v. Ringstaff*, 69 Ala. 140; *DeJarnette v. McDaniel*, 93 Ala. 215. Such indefiniteness may be cured by parol evidence.—*Webb v. Eleyton Land Co.*, 105 Ala. 478, and cases there cited.

DENSON, J.—This is the second appeal by Allen P. Howison from a decree of the chancery court of Bibb county overruling a demurrer to a bill filed against him by Arthur S. Bartlett and others to have a contract for the sale of lands and timber rights specifically performed. The decree of the chancellor was affirmed on the former

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appeal. When the case returned to the chancery court, the complainants amended the bill, and the demurrer to the bill as amended was renewed. Notwithstanding the amendment, the questions presented by the present record for determination by this court are precisely those that were determined on the former appeal. So that, unless the court recedes from the views held and conclusions announced on that appeal, an affirmance of the decree of the chancellor must follow.—*Howison v. Bartlett*, 141 Ala. 593, 37 South. 590.

The contract of which specific performance is sought exists by virtue of an option to purchase lands given by respondent and an acceptance thereof by complainants Bartlett, Robertson, and Ensign, whose property rights thereby acquired have been assigned to the complainant corporation. The entire contract is made an exhibit to the bill and is contained in three papers of different dates. The bill states that on the 30th day of May, 1901, complainants made a contract to buy from Howison other and different lands, and did afterwards buy as agreed. The contract here sued on, called an "option," is a part of the first contract, and is as follows: "Said first party, in consideration of the premises, hereby gives to second party an option to purchase two other tracts of timber land and timber rights or either of said parcels; one known as the 'Active Tract,' consisting of about three thousand acres, more or less, in the vicinity of Active, Bibb county, Alabama, and the other known as the 'Trio Tract,' consisting of about five thousand acres, situated near Trio, in said county and state, and constituting all the virgin growth, long leaf, yellow pine timber lands and rights owned by the first party in T. 22, R. 11—10—9 east Cahaba river, at the price of six dollars per acre, and said option to be exercised within ninety days from date. If the option is accepted, then purchase to be consummated on the same terms and conditions as herein above mentioned, except as to price per acre. This option relates only to virgin growth, long leaf, yellow pine timber lands and timber rights which have not been cut over or denuded." The terms and conditions (except

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that we substitute \$6 per acre for 5.55 per acre) are as follows: "Second parties hereby agree to and do purchase said lands and timber rights and agree to pay therefor as follows: Six dollars per acre, which said sum said second parties are to pay as follows: Fifteen thousand dollars (\$15,000.00) cash on execution of this agreement, balance within thirty days after completion and delivery of surveys and abstracts of title as hereinafter provided. Said first party agrees to furnish at his own expense said second parties full abstracts of title to all said real estate and timber rights, showing good, marketable title thereto. Said premises to be at once surveyed by some competent surveyor to be mutually agreed on by the parties hereto, and said real estate and timber right mapped and plotted and the lines and corners sufficiently marked to designate the outside boundaries of said land, and the number of acres of land and the timber rights, computed, and the expense thereof shall be borne by the parties hereto equally." On July 18, 1901, the respondent executed a written agreement in these words: "For value received I hereby extend the written option on the Active and Trio properties for the period of sixty days from August 30, 1901." On October 25, 1901, respondent, together with complainants Bartlett, Robertson, and Ensign, signed a writing as follows: "Option as to Active and Trio tracts accepted October 25th, 1901. Abstracts of title and survey and map to be furnished within thirty days from date, and deeds to be delivered and purchase price paid within ten days thereafter."

As was stated in the opinion on the former appeal: "To defeat the bill the respondent urges only those grounds of the demurrer which are interposed upon the assumption that the contract is incomplete for want of survey by a surveyor agreed on by the parties, and that the contract is fatally uncertain as to the property intended to be transferred." It is an elementary principle in equity jurisprudence that specific performance will not be decreed of an agreement for sale, unless the property to be conveyed is fixed with certainty as to the locality and description of the land. This principle is

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equally applicable with respect of the price to be paid.—Waterman on Specific Performance of Contracts, §§ 154, 147; *Cox v. Cox*, 59 Ala. 592. The reason for this principle is obvious, and was stated by Judge Story in this language: "For a court of equity ought not to act upon conjecture; and one of the most important objects of the statute of frauds was to prevent the introduction of loose and indeterminable proofs of what ought to be established by solemn, written contracts."—1 Story's Eq. § 764. While the foregoing is true, yet it is equally true that it is not indispensable that the land should be so accurately described as to leave no doubt as to what is meant; evidence dehors the contract being admissible to explain ambiguous terms, under the maxim, "That is certain which may be made certain." This principle was recognized in the opinion of the court on the former appeal in this case in this language: "Neither the statute of frauds nor any principle governing specific performance requires such definite description of the land as to preclude the necessity for a resort to extrinsic evidence, such as will render the given description certain."—Waterman on Specific Performance, § 144; *Bass v. Gilliland's Heirs*, 5 Ala. 761; *Meyer v. Mitchell*, 75 Ala. 475; *Angel v. Simpson*, 85 Ala. 53, 3 South. 758; *Driggers v. Cassady*, 71 Ala. 529; *Howison v. Bartlett*, 141 Ala. 593, 37 South. 590; *Homan v. Stewart*, 103 Ala. 644, 16 South. 35. Under the doctrine last asserted there can be no doubt that, while the contract does not indicate with certainty, the quantity or precise location of what is therein described as the "virgin growth, long leaf, yellow pine timber lands and timber rights which have not been cut over or denuded," owned by the defendant in the given territory, yet it may be, and according to the averments of the bill it is, true that the description given in the contract is sufficient to admit parol proof to identify the lands and this could be done by survey.

But the clause with respect to the survey marks the point of cleavage between the parties. It is the point of difficulty in the case. On the former appeal this clause was disposed of by the court in the following language:

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"By our construction of the stipulation of a survey of the land, it was not intended to make the selection of a surveyor, or the act of surveying, essential to the completion of the sale. Such survey was provided for only as an incident of the sale and for the purpose of measuring and marking out the property constituting the subject-matter of the contract." The argument of counsel for appellant in opposition to this view is based upon that line of cases in which it has been held that where the price of property, the subject of the sale contract, is to be fixed by arbitrators selected by the parties, the contract is incomplete and incapable of specific performance until the price is fixed in the mode provided. Of the cases referred to, that of *Milnes v. Gery*, 14 Ves. Jr. 399, is regarded as the leading one. The substance of the agreement there was that an estate might be purchased at a price to be fixed by two arbitrators selected by the parties, and if the arbitrators could not agree they should select a third person, whose determination therein should be final. The arbitrators could not agree on the price, nor were they able to agree on a third person who should make a final determination. The plaintiff in the case filed a bill to have the agreement carried into execution, praying that a proper person or persons might be appointed by the court to make valuation of the property, or that the valuation should be ascertained in such manner as the court should direct. The defendant relied upon the incomplete state of the agreement. Sir William Grant, speaking for the High Court of Chancery, there held that, the price being of the essence of a contract of sale and the parties having agreed upon a particular mode of ascertaining the price, for the court to declare that one should take and the other should give a price fixed in any other manner would not execute the agreement of the parties, but would be making an agreement for them, and execution of the contract was denied.

The same doctrine has been followed in this country. —*Norfleet v. Southall*, Murp. 189; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380. "This case has been approved and its doctrine followed in many

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subsequent ones, nor has it ever been repudiated; but the court in the most recent English decisions has declared that its doctrine should not be extended, but should be restricted in its application to the exact facts."—Mr. Pomeroy says there is a second class of contracts, "which embraces those in which a mode for ascertaining the price is mentioned, but from the language of the stipulation it is regarded as nonessential, and as something by way of suggestion, so that the agreement itself is virtually one to sell for a fair price. The tendency of the later English decisions is to consider these stipulations for a determination of the price by third persons rather as matter of form than of substance, and to construe them in such manner that they become incidental to the main object of the agreement. The court will always look at the substance of the agreement, and disregard the mere forms which have been provided for effecting it, and which cannot be made operative."—Pomeroy on Contracts, §§ 150, 151. "The result is that, while the case of *Milnes v. Gery* and the class of cases to which it belongs has not been repudiated, it is carefully restricted to the kind of contracts already mentioned. The court will treat the contract as falling within the second class, unless it would thereby do violence to the language and thwart the intent of the parties."—Pomeroy on Contracts, *supra*; *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304; *Town of Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

The sense of these cases is that, where the contract specifies a mode of ascertaining the price which is essential, the contract is conditional until the ascertainment, and is absolute only when the price has been determined. If there be default in this respect the contract remains imperfect, and incapable of being enforced.—Fry on Specific Per. 163. In this case the contract fixes the price to be paid for the lands and timber rights at six dollars per acre. So it cannot be reasonably said that the price is left open. The most that can be claimed by appellant with respect to this feature of the contract is that the total sum to be paid is dependent upon the number of acres.

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We have seen that the property is so described that it may be definitely located by parol proof, and that this character of proof is admissible. The only office left, then, to the surveyor to perform, would be to run out the lands and ascertain the number of acres. So with the price per acre given, and the property capable of being definitely located, we cannot, after construing the contract as a whole, think that it was the intention of the parties that the selection of a surveyor should be an essential to its completion.

We have not overlooked the case of *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46, so strongly relied on by the appellant. We are of the opinion that the facts of the case at bar distinguish it from that case. The conclusion is that we will adhere to the decision made in the case on the former appeal, and the decree of the chancellor must be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

Anderson, et al v. Buckley, et al.

*Bill by Minority Stockholders for an Accounting to
Remove the Trustees, and for a Receiver.*

(Decided May 31st, 1906. 41 So. Rep. 748.)

1. *Insurance; Dissolution of Company; Assets.*—Under a resolution passed by the directors of a fire insurance company, among whom were complainant minority stockholders, certain stockholders of the company gave demand notes equalling in amount their stock in the corporation; the resolution provided that upon a dissolution of the corporation or upon the winding up of its affairs, such of the stockholders as did not make contribution in the shape of such notes, should not be entitled to par-

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ticipate in any fund to be derived therefrom. Such contributions were intended for the benefit only of the creditors of the company. The corporation was dissolved, and all of its debts and demands paid. Held, that though the notes were supported by a consideration, in that they were given to raise the capital stock of the company to a sum where it could continue business without forfeiting its charter, the non-contributing stockholders were not authorized to seek a collection of the notes and participate in the distribution of the proceeds of the same.

2. *Estoppel; Representation.*—A statement was filed by the insurance corporation under § 1109, Code 1896, showing the corporate assets, etc., the notes were put in as part of the assets of the corporation, and by the statement a continuation of the company's franchise was secured. Held, this fact did not estop the shareholders, who had executed the notes, from denying that they were unconditional obligations.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

This was a bill filed by appellant and others, minority stockholders, against the appellee and others, as board of directors, alleging the incorporation of the Capital City Fire Assurance Company, the expiration of its charter by limitation, its dissolution, and the winding up of its affairs by its board of control. It charges that valuable assets in the shape of notes of various parties, among them a number of trustees of the corporation, and other valuable assets, have passed into the hands of these trustees, and that the outstanding debts and liabilities of the corporation amount to not more than \$40,000. The bill also alleges that the trustees or board of control are making no effort to collect the notes, but are permitting the same to become barred by the statute of limitations. The prayer is for an accounting by the defendants named respectively herein, that they be removed from being trustees of the corporation, and that some proper person be appointed, as a receiver to take charge of and collect the assets.

GUNTER & GUNTER, for appellant.—There is but a single question in this case, and that is, whether or not certain notes referred to are assets of the corporation. The

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notes were given to enable the company to show that its capital stock, \$100,000, was intact, and thus, to enable it to continue business and avoid a dissolution.—§ 1109, code 1896. This was ample consideration for the notes. He who commits a fraud cannot claim any right based on such fraud.—*Pitcairn v. Ogburn*, 2 Vesy. 375; *Dial v. Hair*, 18 Ala. 798. While the directors had the right to make the donation for the purpose it was made they could attach no condition thereto.—2 Thompson on Corp. § 1308-9; *Boyd v. P. B. R. R. Co.*, 90 Pa. St. 169; 10 Cyc. 413. The following cases are in point: *Williams v. Page*, 24 Beav. 654; *Clement v. Bous*, 1 Drew. 684.

HORACE STRINGFELLOW, for appellee.—The contributions evidenced by the notes were intended only for the benefit of the creditors of the company, and the debts were all paid, and under the resolution under which the notes were executed, if paid, they could not enure to the benefit of complainant.—*Collier v. Dick*, 111 Ala. 263.

HARALSON, J.—There is but a single question presented on this appeal, viz.: Whether certain notes executed by the respondents to Commercial Fire Insurance Company, should be treated as general assets of the corporation after dissolution and collected for distribution among the stockholders. The facts necessary for a fair consideration of the question are these: The notes were executed solely in pursuance of a resolution of the directors of the company at a meeting when respondents and complainant Anderson, all of whom were directors, were present. This resolution directed the vice-president to call upon the several shareholders to contribute to the capital stock of the company in proportion to their several holdings, "and to accept for such contributions the demand note of the contributors but upon a dissolution of the corporation or the winding up of its affairs such stockholders as shall not make such contributions shall not be entitled to participate in any fund to be derived therefrom. Such contribution being intended for the benefit only of the creditors of the company." Complain-

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ants were non-contributing stockholders. Soon after the notes were given, the secretary and manager of the company, prepared the statement required by section 1109 of the code of 1896 to be filed in the office of the state auditor. This statement submitted to and approved by the directors, included these notes as part of the assets of the company and were filed with the auditor. Unless the notes had been so used as assets of the company the condition of the company was such as it was regarded by the directors as subjecting the company to have its authority to continue business revoked by order of the auditor under authority of section 1203 of the code of 1886. The notes were wholly without consideration except as shown, were given for the accommodation of the company, to be used only as needed in payment of the company's debts, and none of the makers received anything for the notes. The debts of the company have all been paid and there is no need for the collection of the notes for the purposes expressed in the resolution under which they were given. It is now contended that the notes should be collected as other assets and distributed among the stockholders generally.

When the case was here on a former appeal we held that "these notes are absolutely without consideration as to these complainants, who are not creditors, but merely shareholders of the corporation, and not contributing shareholders under said resolution."—*Anderson v. Buckley*, 126 Ala. 623,, 28 South. 729.

It is insisted under the facts as now presented a consideration is shown, that the notes were given to raise the capital stock of the company to a sum where it could continue business without forfeiting its charter; that a statement was filed including these notes as assets and on the faith of such statement it was permitted to continue business, and the stockholders suffered by the risk of losses by a continuance in business. These risks is said to be a sufficient consideration for the notes. If we concede for argument that such would be true that there was such consideration moving from the stockholders of the corporation as would render the contract binding,

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it would become binding only according to its terms. The resolution under which the notes were given was a part of the contract.. The provisions that the fund should be for the benefit of creditors only, that non-contributing shareholders should not participate therein, was as much a part of the contract as if written in the face of the notes themselves. A consideration for a contract renders the contract binding if not otherwise illegal, but certainly a consideration cannot warrant the making of a different contract from that which the parties made themselves. We think the question of consideration *vel non* can work no advantage to complainants; it cannot change the term of the contract; it cannot make the notes inure to the benefit of those expressly excluded from their benefits.

We pass to a consideration of the question of estoppel. It is insisted that having reported these notes as part of the assets of the corporation in the statement required by law to be furnished the auditor and thereby secured a continuation of its franchise, the respondents are estopped to deny that the notes were unconditional obligations, that to set up that the notes were not absolutely bona fide assets for all purposes would be to perpetrate a fraud on the law, so to speak.

It is first to be noted that the filing of the statement under section 1109 of the Code of 1896, is required of corporations as such. It is the act of the corporate body. In making the statement the officers represented all the shareholders, including these complainants as well as those making the notes. If a fraud is perpetrated on the state by the make up of the statement, the shareholders, who reap the benefits of such alleged fraud, are not in a position to complain. It appears that the complainant, Anderson, had full knowledge of all the circumstances attending the giving of the notes as well as the purpose thereof, and also of the making out of the statement now complained of. While he says he did not favor the movement it does not appear that even a protest was made by him as to the propriety of the statement furnished the Auditor. If, as now contended, by the complainant, Anderson, the statement

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to the Auditor was fraudulent and he did not approve of it, and was unwilling to assume the risk of injury to him as a shareholder by a continuance of the business, then he could have sought redress in the corporation, and failing there, other remedies were open to prevent the consummation of the illegal plan.

Again, the requirements of the law that insurance companies shall have a designated paid-up capital, and shall make statements to the Auditor of the assets and condition of the business, are manifestly for the benefit of the public who may have dealings with such companies. We would not say such statement is for the benefit alone of policy holders, or creditors of the company. Persons led to deal in the stock or bonds of such company on the faith of such statement, might be authorized to insist that those in the corporation responsible for the statement should make it good. But certainly such statement is not made for the information of the directors and shareholders of the corporation who own and control its property and affairs at the time it is made. These have other and direct sources of information, and as before pointed out, are responsible to the public for the statement itself. It is an elementary principle of estoppel that the person who sets it up must have relied upon the truth of the statement; must have had the right to rely upon it, and must have altered his position for the worse, if the party estopped should gainsay the truth of the statement. If, as claimed, the report to the Auditor was misleading and fraudulent, these complainants have in no way been misled by it; they have not been induced thereby to alter their position for the worse. Estoppels are for protection, not for gain. It is not shown that complainants have suffered any injury by the matters complained of. It is not questioned that if the rights of creditors were involved the makers of the notes would be bound to respond. In fact, it appears that the whole movement was for the purpose of protecting, rather than injuring creditors, and incidentally to prevent a premature and forced dissolution of the corporation resulting in probable injury to stockholders

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by a hasty liquidation of its affairs. The makers of the notes are not shown to have had any interest whatever personal to themselves. Whatever benefits they derived, or hoped to derive, so far as the record discloses was in common with all the shareholders, complainants included. We cannot conceive any equitable right in complainants to profit to the extent of their pro rata of the proceeds of these notes at the expense of their associates.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ.,
concur.

Lea, et al v. Iron Belt Mercantile Co.

*Bill by Judgment Creditor of Insolvent Corporation to
Condemn an Unpaid Stock Subscription.*

(Decided July 6th, 1906. 42 So. Rep. 415.)

1. *Corporations; Stockholders; Liability for Debts; Stock Issued for Insufficient Consideration.*—Where members of a corporation paid for the stock issued to them by conveying land at an agreed valuation, which was considerably over-valued, a subsequent creditor, who had full knowledge of the fact, cannot compel a stockholder, on the insolvency of the corporation, to pay the difference between the value of the land conveyed by him and the par value of the stock.
2. *Same; Officers and Agents; Knowledge of Agents.*—Where the agent of a corporation, being the sole manager and almost sole stockholder of the corporation, was personally interested in a transaction with the insolvent corporation, and his transactions with the insolvent corporation was for the joint benefit of himself and his corporation, his knowledge of the fact that the subscriptions to the insolvent corporation stock were paid in over-valued land, was imputable notice to his corporation.
3. *Same.*—The rule that the knowledge of an agent prior to the creation of the agency is not notice to the principal, does not apply where the agent was the alter ego of the principal, which he represented, and had absolute dominion over its affairs and was jointly interested with the principal in the transaction.

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APPEAL from Calhoun Chancery Court.

Heard before Hon. R. B. KELLY.

Bill by the Iron Belt Mercantile Company against Preston Lea and the Piedmont Land & Improvement Company. From a decree for plaintiff, defendants appeal.

The facts are sufficiently stated in the opinion of the court.

J. J. WILLETT, for appellant.—The decree pro confesso against the Piedmont Land & Improvement Company was erroneous in the absence of proof of proper service of the summons.—*Independent Publishing Company v. American Press Association*, 102 Ala. 475. The receiver was and is an indispensable party to this proceeding, as the right to the unpaid subscription is in him.—*Proutt v. Hage*, 57 Ala. 28; *Sawyers v. Baker*, 66 Ala. 292; *Lawson v. Ala. Warehouse Co.*, 73 Ala. 290.

The complaining creditor became such with the knowledge that the corporation had received from the stockholder in full payment of his subscription for stock, property at an over-valuation and cannot require such subscribers to pay for its benefit the difference between the par value of the stock and the real value of the land.—*Rickerson Roller Co. v. Farrell Co.*, 75 Fed. Rep. 55; *Hospes v. Northwestern Car Co.*, (Minn.) 50 N. W. Rep. 1117; *Hastings Malting Co. v. Iron Range Co.*, 67 N. W. Rep. (Minn) 652; *Clark v. Beaver*, 139 U. S. 97; *Bank of Fort Madison v. Alden*, 129 U. S. 372; *N. W. Mutual Life Ins. Co. v. Cotton Exchange Real Est. Co.*, 70 Fed. Rep. 155; *Nicrosi v. Calera Land Co.*, 115 Ala. 429; *Carp v. Chipley*, 73 Mo. App. 22 Am. Digest p. 977; *Adamant Manufg Co. v. Wallace*, 48 Pacific 415, (16 Wash. 614); *Phelan v. Hazard*, (5 Dillon) Fed. Cases 11068; *Bush v. Robinson*, (Ky.) 26 S. W. Rep. 178; *Cole v. Adams*, 1 J. A. (Texas) 319; *Continental Trust Co. v. Toledo R. R. Co.*, 82 Fed. Rep. 643, (Opinion by Judge Taft); *Bruner v. Brown*, (Ind.) 38 N. E. Rep. 318; *Mathis v. Pridman*, (Texas) 20 S. W. Rep. 1015; 23 Am. & Eng. Ency. of Law, p. 863, (Note

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4); *Young v. Erie Iron Co.*, 65 Michigan 127; particular attention is directed to *Hospes v. Car Co.*, and *Hastings Malting Co. v. Iron Range Co.*, *supra*.

The knowledge acquired by the agent was the knowledge of the corporation in this instance, as such agent was the alter ego of the corporation.—2 Pomeroy Eq. Jur. (3rd Ed.) Secs. 670 and 672, and authorities cited in notes thereto.

BLACKWELL & AGEE, and CABANISS & BOWIE, for appellee.—The bill is sustained by the following authorities.—*Eleyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 404; *Hall v. Henderson*, 21 So. Rep. 1020; *Roman v. Dimmick*, 22 So. Rep. 109. Upon these same authorities the decree of the Chancellor should be upheld.

TYSON, J.—The bill in this case was filed by a judgment creditor of the Piedmont Land & Improvement Company, an insolvent corporation, after execution with a return of “No property found,” seeking to condemn an alleged unpaid subscription to capital stock of said corporation made by respondent Lea. When this cause was here on former appeal, the equity of the bill was sustained, not upon the theory that complainant’s right to condemn the unpaid subscription was on account of any privity of contract existing between it and the subscriber Lea, or that the statute under which the debtor corporation was organized created a liability which the complainant would have the right to enforce, but solely upon the ground of fraud, in that the complainant, on the facts averred “would be justified in presuming * * * that the law requiring the subscription to stock to be paid in money or in property at its reasonable value had been strictly complied with.”—*Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 South. 28. In *Elyton Land Company v. Birmingham Warehouse Company*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65, the bill was by a judgment creditor, as here, seeking to subject an unpaid subscription, on the ground that the property was knowingly accepted by the corporation, in discharge

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of the subscription obligation, at a valuation grossly in excess of its true value. The court, after an exhaustive examination of the authorities and a careful review of the constitutional and statutory provisions bearing upon the subject of the organization of corporations, held that while the acceptance of the property may bind the corporation, it was not binding on creditors, without notice of the mode in which the stock subscription was undertaken to be paid, because it was a fraud upon them, in that "the capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in or that it may be reached."

The case now being before us on its merits, the first question to be determined is whether the allegations of the bill charging fraud in the discharge of the subscription obligation by the conveyance of property at an overvaluation are satisfactorily shown by the evidence. It appears that a number of persons, owning or controlling a tract of land costing them about \$100,000 organized the Piedmont Land & Improvement Company for the purpose of selling the lands as town lots, and subscribed for \$1,250,000 of stock, paying the same, under their contract of subscription, by conveyance of the tract of land, comprising some 2,200 acres. Respondent Lea's subscription was \$118,750, which was paid by his pro rata share of the land. The capital stock of the company, to the extent of \$250,000, was donated to the company, thus reducing the price at which the land was valued to \$1,000,000. The company was organized in January, 1890, took possession of the property, and sold in a few weeks about 200 acres of this land for about \$350,000, and the same land shortly afterwards was worth in the market and sold for as much as \$700,000. These events occurred during the excitement of the speculative period, in full force at the time of the organization of the company and for some time afterwards. When the collapse came, it was realized that values were based on illusions, and this company, with many others, became insolvent. The fact that this was not an isolated case of adventure, but an example of the

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general excitement of the country at that time, and that the expectations of the organizers of this company seemed on the point of full realization, go very far to show that its organization was in entire good faith and without the least purpose to defraud. And so we must take it that the original subscribers for stock intended merely to take advantage of the opportunity and sell through the instrumentality of the corporation their body of land. Still we cannot resist the conclusion, and so hold, that the land conveyed was not at that time of the money value at which it was estimated, and that the corporators must have known that fact, however much they may have believed it would advance in the future.

Having reached this conclusion, we shall now consider the defenses. The respondent Lea, in his answer, after denying the overvaluation of the land conveyed to the company in payment of his stock subscription, asserts that the complainant had notice that his stock subscription had been discharged to the corporation in the manner shown to have been done, and it is insisted that to compel a subscriber to pay otherwise than as he agreed to pay for his stock to a party who knew, before extending credit, how the subscription had been discharged, would be an injustice. The question presented for our determination, in view of the fact that there was an overvaluation, is whether the fact of knowledge by complainant of the over-valuation, if true, is a good defense, and whether this defense is supported by the evidence. The complainant was organized in 1891, and made the loan, the basis of the judgment sought to be enforced, in 1894 or 1895. It therefore became a creditor of the debtor corporation after that corporation had accepted the lands in discharge of the subscription obligations at the overvaluation complained of. It cannot be doubted that if complainant had notice of the actual state of affairs, being a subsequent creditor, it cannot disturb the arrangement between the company and its stockholders. It is impossible, with notice of the character and value of the land, for complainant to have acted on and trusted appearances, rather than the true condition of affairs,

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and, therefore, to have been deceived. This seems to be the universal doctrine of the courts. This principle, as well as the one upon which the equity of the bill must rest, are ably discussed by Messrs. Clark & Marshall in their work on Private Corporations, at page 2327. These authors, after showing that assets of a corporation are not a trust fund for creditors in any proper sense, say: "It has been repeatedly held, in the absence of special statutory provisions, that where a corporation issues stock as bonus, or for less than its par value in cash, or for property taken for an overvaluation, the transaction cannot be assailed, and full payment by the stockholders required, by or for the benefit of persons who became creditors before the stock was so issued or who participated in the transaction, or who afterwards dealt with the corporation and became creditors with knowledge, for in neither of these cases is there any fraud as against them." "It is difficult, if not impossible," said the Minnesota Supreme Court, "to explain or reconcile these cases upon the trust-fund doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which the stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have the right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating

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the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of bonus stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the trust-fund doctrine has involved it; and we think that, even where the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule." See, also, 2 Morawetz on Corp. § 829; Cook on Stock and Stockholders (2d Ed.) § 44; *First National Bank v. Gustin M. Cor. Min. Co.* (Minn.) 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; *Hospes v. N. W. M. & C. Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Coit v. N. Ca. Am. Co.*, (C. C.) 14 Fed. 12, s. c. 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Ft. Madison Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; note to *Clark v. Berer*, (C. C.) 31 Fed. 676; and other authorities cited on this point on brief of counsel for appellant. This principle does not seem to be controverted, but is sought to be avoided only by a denial of the fact of notice.

The evidence shows that R. J. Riddle organized the complaining corporation, the creditor, and was its president and general manager, and that he constituted the company in all its outside relations with the world. It was by and through him that complainant made the loan sought to be recovered in this suit. The evidence further establishes to our entire satisfaction that Riddle was intimately acquainted with the details of the organization and affairs of the Piedmont Land & Improvement Company. He was "one of the boomers of the town of Piedmont," which was built on the lands subscribed. He was the confidential selling agent of the company, and received in compensation nearly \$8,000 for negotiating sales of this identical land. He applied to the promoters of the

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scheme to be permitted to participate in the purchase of the lands which were conveyed to the company in discharge of the stock subscriptions. He complained that he had not been let in "on the ground floor" as a stockholder in the company. This he would hardly have done without knowing what was on "the ground floor." It can scarcely be doubted, under the evidence, that Riddle knew that the subscription of Lea had been paid with his interest in the land, that the capital stock of the company consisted of land, and that the subscribers for stock did not contemplate further payments on their subscriptions for stock. Nor can it be seriously doubted that Riddle knew, at the time that the debtor company was organized the value of the land conveyed to it by the stockholders in discharge of their subscription, as well as the amount of the capital stock of the company. If Riddle individually had become the creditor, instead of his corporation, whose affairs he seems to have managed to suit his own pleasure and for his personal benefit, there is no doubt that he could not complain of having been deceived or defrauded. It is in effect conceded that Riddle did have the fullest notice; but it is insisted that his knowledge was not acquired in the course of his agency for or management of the complainant corporation, and, therefore, his knowledge cannot affect the rights of that company. Conceding the soundness of the insistence in a proper case, it is but a rule of evidence, and has its limitations. Under the facts of this case, the rule has no application, and, therefore, can exert no influence in its decision. Here Riddle was personally interested and concerned in the agreement by which the debt now sought to be collected originated. Besides, he was the sole manager and controller of the creditor company at his will—its alter ego—and, it seems, was its sole stockholder but one; the other being a non-resident. Indeed, it is difficult to consider him as other than the creditor corporation itself, so completely were the affairs of it subject to his will and under his immediate control. But in this particular transaction he acted both for himself and for his company. The result of that transaction was the acquisition

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by him personally of \$30,000 of bank stock and the note for his company evidencing the loan, and of some \$90,000 of collateral. All of this he and his company acquired as part of the consideration for making the loan, constituting the debt which his corporation is now attempting to collect by this proceeding. So, then, we must look upon Riddle in two capacities—one as an individual, and the other as manager of his company. Riddle as an individual and Riddle as manager are found entering into a joint transaction for their joint benefit with the agent of the Piedmont Land & Improvement Company with full legal knowledge of the details of the organization of that company. In short, he as an individual and as manager co-operated in doing an act for their joint interest. As to this particular act or transaction they became as one person, and the knowledge of the one must be imputed to the other. For Riddle as an individual and Riddle as general manager of his corporation could not do a single act for their mutual benefit from different standpoints. It would be a psychological impossibility for him to have had a different consciousness respecting the affairs of the debtor corporation, as general manager of his company, from what he had individually; and so we hold that as general manager he had the same familiarity with the affairs of the debtor company that he undoubtedly possessed individually.—*Anderson v. Kinley*, 90 Iowa, 554, 58 N. W. 909, *Huron Printing Co. v. Kittleson*, 4 S. D. 520, 57 N. W. 233.

It may be well, however, before concluding, to notice the contention of appellee on this point. The insistence is that as Riddle was an agent of his corporation, and acquired the knowledge which we have imputed to his principal antecedent to its organization, the rule applies "that notice to an agent, to bind his principal, must have been acquired by the agent during his employment—i. e., while he is actually employed in the prosecution of his duties as agent—and not at a time antecedent to the period of his agency."—*Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 51, and cases there cited. But this principle, as we have said, has no application

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to the facts of the case. In all cases where it has been enforced and applied by this court as a rule of evidence, the relation simply of principal and agent existed between the parties. In none of them was the party possessing the knowledge sought to be imputed to the principal anything more than a mere agent. He was not the alter ego of the corporation, as here, and had not the absolute dominion over its affairs, as Riddle is shown to have had. In none of them would the pecuniary interest of the agent have directly affected as in the case of Riddle. Suppose Riddle had acquired the knowledge while manager of his company, in a transaction for it prior to the one here involved, and desired to communicate it to his corporation, to whom would he have communicated it? He was, as we have said, to all intents and purposes the corporation itself. It could be nothing but the sheerest nonsense to say that as agent he should communicate the knowledge to himself as the managing representative of his corporation. Since the corporation could acquire notice in no other way than by and through its managing head or officer, it will scarcely be doubted that notice to such officer is of necessity notice to it.

But this court has not in all cases applied the rule here invoked by the appellee. To the contrary, in a number of them the knowledge of the agent, though acquired in an antecedent proceeding or transaction, although the principal was a complete stranger to that prior proceeding or transaction, was imputed to the principal, and he was charged with the knowledge of his agent. The following are some of these cases:—*White v. King*, 53 Ala. 162; *Dunklin v. Harrey*, 56 Ala. 177; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *City Nat. Bank v. Jeffries*, 73 Ala. 183. We have but to read the facts of these cases to see that this is true. So, then, the rule invoked and relied on by appellee has not been uniformly applied by this court, and while the cases last cited make no reference to it, or the cases in which it was applied, there is really no conflict between the two lines of cases. The cases last cited by us must be regarded as being controlled by the limitation put upon the general rule which was applied

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in those relied on by appellee. That the application of the general rule as laid down in *Goodbar v. Daniel, supra*, is subject to an important and well-settled limitation, does not admit of serious controversy. It is this: "Where the transaction in question clearly follows and is intimately connected with a prior transaction, in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite (general rule) becomes inapplicable. The notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to and wholly unconnected with the proceeding or business."—2 Pom. Eq. Jur. (3d Ed.) § 672, and notes; Mechem on Agency, § 721. And this principle is fully applicable to corporations.—Id. § 670, note 2, and cases there cited. See, specially, *Willard v. Denise* (N. J. Err. & App.) 35 Am. St. Rep. 788, and note.

We are not to be understood that this limitation is without its exceptions. The notice or knowledge of the agent will never be imputed to his principal (1) "when it is such as it is the agent's duty not to disclose; (2) When the agent's relations to the subject-matter or his previous conduct renders it certain that he will not disclose it; and (3) when the person claiming the benefit of the notice, or those whom he represents, concluded with the agent to cheat or defraud the principal." Mechem on Agency, *supra*. So, then, if it be conceded that the point under consideration is controlled by the rules governing principal and agent, it may be held, in harmony with our own cases, under the limitation declared by Mr. Pomeroy and Mr. Mechem in their excellent works, that Riddle's knowledge is imputable to his corporation. It would, therefore, necessarily follow that, complainant being chargeable, at the time of the creation

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of its debt, with notice of the overvaluation of the land accepted by the debtor corporation in discharge of the stock subscription, it cannot maintain this bill to charge respondent Lea on his subscription. This renders it unnecessary to consider the other assignments of error by appellant Lea.

In reference to the error assigned by the Piedmont Land & Improvement Company, it appears that there is a decree pro confesso, but the decree does not show that the person upon whom the service was had was a person on whom service could be made. That decree is, therefore, erroneous.—*Independent Pub. Co. v. Am. P. Association*, 102 Ala. 475, 15 South. 947.

The decrees of the lower court are reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Stephenson v. Atlas Coal Co.

Bill to Cancel Executed Contract for Partial Failure of Consideration.

(Decided May 17th, 1906. 41 So. Rep. 301.)

1. *Contracts; Cancellation; Grounds.*—Neither inadequacy of consideration, mistake in law, or partial failure of consideration, in the absence of fraud, will authorize the cancellation of a contract.
2. *Equity; Pleadings; Motion to Dismiss.*—On motion to dismiss for want of equity all amendable defects of the bill must be taken as cured, but this rule does not mean that the bill is to be considered as amended so as to give it equity by the averment of new, additional or independent facts; but only as to amendable defects apparent from the bill from its averments.
3. *Same; Amendment; Time.*—Time will not be allowed for amendment after decree on motion to dismiss for want of equity.

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APPEAL from Walker Chancery Court.

Heard before Hon. ALFRED H. BENNERS.

Bill by H. W. Stephenson against the Atlas Coal Company. From a decree sustaining a motion to dismiss for want of equity, complainant appeals.

D. A. MCGREGOR, and SMITH & SMITH, for appellant.—The bill contained equity and its dismissal error.—15 A. & E. Ency. of Law, p. 1002; 10 A. & E. Dec. p. 37; *Long v. Ga. Pac. R. R. Co.*, 91 Ala. 519. If the bill was amendable it was improperly dismissed in vacation without giving an opportunity for amendment.—3 Mayfield, p. 333.

LONDON & LONDON, for appellee.—Inadequacy of consideration alone is not sufficient to authorize cancellation.—3 Pomeroy, 826 and 928. Fraud, mistake of law must be alleged in the aid of partial payment before cancellation.—*Bell v. Lawrence*, 51 Ala. 160; *Ex parte Hayes*, 92 Ala. 120; *Stacey v. Walter*, 125 Ala. 291. Under the allegations of the bill the status quo cannot be restored.—*Piedmont Co. v. Piedmont*, 96 Ala. 389. Complainants have been guilty of laches.—*Allgood's case*, 115 Ala. 418; *Dean v. Oliver*, 131 Ala. 634.

DOWDELL, J.—The purpose of the bill filed in this case is the cancellation of an executed contract on the ground of a partial failure of consideration. No fraud is alleged. The cause was submitted on motion to dismiss the bill for want of equity, and was held for decree in vacation. A decree was rendered in vacation sustaining the motion and dismissing the bill for want of equity. From this decree the present appeal is prosecuted.

Mere inadequacy of consideration is not sufficient to authorize the cancellation of a contract.—3 Pom. Eq. Ju. 826-928. Nor will mistake in law or partial failure of consideration, in the absence of fraud, authorize the cancellation of a contract.—*Bell v. Lawrence's Adm'r*, 51 Ala. 160; *Ex parte Hayes*, 92 Ala. 120, 9 South. 156;

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Stacy v. Walker, 125 Ala. 291, 28 South. 89, 82 Am. St. Rep. 235. The rule is well established in this court that, on a motion to dismiss a bill for want of equity, the bill must be taken and considered as amended in all amendable defects. This, however, is not to be understood that the bill is to be considered as amended so as to give it equity by the averment or averments of new, additional, or independent facts, but only as to amendable defects apparent on the face of the bill from the averments therein contained.—*Blackburn v. Fitzgerald*, 130 Ala. 584, 30 South. 568. The plain sense of the rule in taking the bill as amended in all amendable defects on a motion to dismiss for want of equity leaves no room for argument or reason for granting time for amendment of the bill after decree on motion to dismiss for want of equity.

The decree dismissing the bill for want of equity is free from error.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Montgomery Iron Works, *et al.* v. Roman.

Bill by Creditor of Corporation to Require Stockholders to Pay Balance due on Subscription to Stock.

(Decided June 30, 1906. 41 So. Rep. 811.)

1. *Corporations; Stockholders; Transfer of Property.*—Defendants purchased the property of another company for \$25,000, agreeing to pay, in addition, certain debts of the company amounting to about \$4,000. The consideration stated in the deed transferring the property to them, they procured to be \$50,000, and they subscribed thereafter, \$50,000 to the stock of the new company, which they paid by executing a deed to the property purchased from the other company, and were to receive, in addition to their stock, \$30,000 of an issue of bonds

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to the amount of \$50,000, to be secured by a deed of trust on the property of the new corporation. Of this issue they received \$25,000 of bonds. On a sale of the property under the deed of trust the bondholders realized only 20 per cent. of the amount due on their bonds. The evidence showed that \$50,000 was full value for the property conveyed to the new company. Held, that as the evidence showed a sale of the property to the new company for \$80,000, which was to be paid for by \$50,000 of the stock and \$30,000 of bonds, the reception of the bonds at a later period does not alter the fact that it was one and the same transaction, and for this reason the stockholders were not, at the suit of a creditor of the corporation, entitled to have the entire value of the property applied as a payment on the stock.

2. *Same; Actions by Creditors; Limitations.*—The statute of limitations does not begin to run in favor of stockholders for unpaid subscriptions to stock, at the suit of a creditor of the corporation, until judgment against the corporation and a return of an execution *nulla bona*.
2. *Judgments; Conclusiveness; Res Adjudicata.*—After judgment against the corporation and execution returned unsatisfied, plaintiff sued out writs of garnishment against certain stockholders for unpaid subscription, as authorized by § 2182, code 1896. The stockholders answered denying indebtedness, and, no contest being filed, garnishees were discharged, which judgment was reserved on appeal, after which one of the stockholders was discharged with plaintiff's consent, and two others were fully examined touching their liability. One of these was discharged and the judgment affirmed on appeal, and plaintiff took nonsuit as to the other; Held, that as to all the garnishees, except the one against whom the non suit was entered, the judgment of discharge was *res adjudicata* as to plaintiff's right to enforce their alleged liability by bill in equity under § 823, code 1896.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

This was a bill filed by Sigmund Roman against the Montgomery Iron Works and certain stockholders thereof alleged to be solvent, and not filed against certain other stockholders on account of their alleged insolvency. The case made by the bill is the organization of the corporation, the fixing of the capital stock at \$50,000, and

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the paying of said stock by a delivery to the corporation of certain land, houses and machinery, alleged to be worth, then and now, not more than \$25,000, and the issuance of bonds for \$50,000, running 10 years, with interest at the rate of 8 per cent., secured by a trust deed on the property of the corporation, with one Hannon as trustee, and with the rights and power of foreclosure usual in such trust deeds on the failure to pay interest coupons attached to the bonds. The bill further alleges that Dimmick, Baldwin, and Craik are the only solvent stockholders; that Dimmick subscribed \$5,000 to the capital stock, Baldwin \$5,000, and Craik \$2,500; and that each had paid only one-half of their subscription. The bill further alleges: That of the \$50,000 worth of bonds issued \$25,000 were put in circulation as follows: To Dimmick, \$5,000; to Baldwin, \$5,000; to Craik, \$2,500; to Chambers, \$5,000; to Bibb, \$7,500. That these bonds were issued and turned over to the above-named parties without pay or promise to pay, without any labor being done, and without money or property actually received for them. That it was a fictitious increase of indebtedness of the corporation. The transfer by all these parties of these bonds before they were due, and the liability of the parties named to the creditors of the corporation for the money value of said bonds, which is alleged to be of the par value of \$100 each. The bill further alleges that the complainant was the holder, for value and without notice of the fraudulent issue of the same, of bonds to the amount of \$2,200, which he alleges he has filed with the trustee under the deed; but, as the assets cannot pay more than 30 or 35 cents on the dollar, this bill is introduced against the defendants for the purpose of having them account for the balance due on their subscription to the stock of the corporation and for the value of the bonds. The bill alleges a judgment in favor of the complainant against the Montgomery Iron Works, an execution thereon, and a return of "No property found." The prayer is for general relief, for service, and for an accounting against Dimmick, Baldwin, and Craik

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for the balance due on their stock subscription, and for the amount due by them on the bonds. Demurrers were filed to the bill, and motion to dismiss it for want of equity, which were overruled. Afterwards the defendants moved to require the complainant to elect whether he would proceed in this cause by bill herein filed or with the garnishment suit alleged to be pending in the circuit court in Montgomery county issued on a judgment obtained by complainant against the Montgomery Iron Works in which these defendants were garnisheed. The court required them to elect. The defendants answered the bill, incorporating therein pleas of the statute of limitations of six years, and in said answer each defendant set up as bar to the action a garnishment writ sued out at the instance of the complainant in this bill on a judgment obtained by him against the Montgomery Iron Works for the amount he seeks to recover by this bill, the service of garnishment upon each defendant, and the answer of the garnishee thereto denying indebtedness, and averring that no contest was instituted testing the answer denying indebtedness. The other facts sufficiently appear in the opinion.

THOMAS H. WATTS and HORACE STRINGFELLOW, for appellants.—No brief came to the Reporter.

GUNTER & GUNTER, for appellees. No brief came to the Reporter.

SIMPSON, J.—From an examination of the testimony we find that there is no controversy about the facts that the property of the Montgomery Iron Works Company was purchased by the promoters of the new company for \$25,000, with probably an additional agreement to pay certain debts of that company, which are stated to be \$3,000 or \$4,000; that said promoters had the amount of the consideration stated in the deed to them as \$50,000; that said promoters subscribed for \$50,000 of the stock of the new company, and paid for the same by conveying said property, and as a part of the agreement were

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to receive, in addition to the \$50,000 of stock, \$30,000 of an issue of bonds to the amount of \$50,000, which were to be secured by a deed of trust on the property, and they did receive \$25,000 of said bonds. Afterwards the property was sold under the deed of trust, and the bondholders realized only about 20 per cent. of the amount due on their bonds. There is a good deal of testimony as to the real value of the property which was conveyed to the company, and, taking all of the testimony we think that \$50,000 would be a full estimate of its value.

It is contended by appellants that the bonds were not received until some time after the organization of the corporation; consequently, that the whole amount of property conveyed should be applied to the payment of the stock, and that, whatever liability there may be on account of the bonds, it cannot be recovered in this action under the previous decision of this case.—*Roman v. Dimmick*, 115 Ala. 233, 22 South. 109. This position is not tenable, because it is testified to by the parties themselves that the property was sold to the company for \$80,000, which was to be paid for by \$50,000 of the stock and \$30,000 of the bonds, so that the time of the actual issue of the bonds does not alter the fact that their reception was a part of the original transaction. If a party owes \$50,000, and conveys property worth \$50,000 with a \$25,000 mortgage on it, he certainly has paid only \$25,000 of the debt. So in this case, even at the valuation mentioned, the parties paid only 50 per cent. of the par value of their stock.

There is no merit in the pleas of the statute of limitations, as the statute did not commence to run as to these parties until the judgment and return of *nulla bona* (*Vaughn v. Ala. Nat. Bank*, 42 South. 64), and the judgment of the city court was correct in holding that the pleas setting up the foreclosure proceeding were "patently insufficient."

It is next insisted that the liability of the respondents on account of their stock subscription is *res adjudicata*, having been determined in the previous proceedings by garnishment, in which the parties as garnishees

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were discharged. It is replied that, because there was no contest of the answer of the garnishees, there were no determination of the fact as to whether the respondents were liable for the balance on their stock, but only whether on the facts disclosed in the answer, there was an indebtedness. There is no dispute about the proposition that, when a matter between the same parties has been decided on its merits by a court of competent jurisdiction, it is *res adjudicata* in all future proceedings between the same parties, and this court has said "the parties must be the same, the point must be directly in question, and the judgment must be rendered on that point."— *Gilbreath v. Jones*, 66 Ala. 129, 132. But in the same case, and others, the court holds that "judgments are final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but that they are equally conclusive upon all the facts which were necessarily involved in the issue. In a subsequent case this court, while adhering to the former definition of the doctrine, states that "the inquiry is not what the parties actually litigated, but what they might and ought to have litigated, in the former suit." And in that case, in which a former decree to compel a settlement of an administration was pleaded, and it was replied that the "issue" was not the same, this court goes on to say: "The main controlling issue in the former suit was the liability of the appellant to account for his administration. * * * We do not inquire whether the former bill was skillfully drawn. * * * A party cannot obviate the force and effect of a judgment against him by invoking his negligence or unskillfulness in pleading. * * * If the former bill was, as is now insisted, so defective in its frame that the appellee could not have obtained full relief, the duty of amendment rested on her. To suffer her to speculate on the chances of obtaining a favorable decree on insufficient pleading, and, after an adjudication against her on the merits, to assail it because of the insufficiency of the pleading, would be manifestly unjust, and would encourage negligence and pro-

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tract litigation. A judgment is conclusive of the entire subject-matter of controversy, of all that properly belongs to it, or that might have been litigated and decided."—*Tankersly v. Pettis*, 71 Ala. 179, 186, 187. In a later case this court said: "A judgment is conclusive against every defense that might have been made against it, whether pleaded or not." See, also, *Board of Com. v. Cross*, (N. M.) 73 Pac. 615; *Withers' Adm'r v. Sims*, 80 Va. 651; *Francis v. Wood*, 81 Ky. 16; *Hardwick v. Young*, (Ky.) 62 S. W. 10; *Le Guen v. Gouverneur*, (N. Y.) 1 Am. Dec. 121; 1 Herman on Estoppel, p. 548, § 456, 457; Id. pp. 551, 552, § 459; Id. p. 312, § 364; *Wood v. Wood*, 134 Ala. 557, 565, 566, 33 South. 347; 24 Am. & Eng. Ency. Law, 795, note; Id. p. 814; *Parkes v. Clift*, 9 Lea (Tenn.) 524; *Oman v. Bedford Bowling Green Stone Co.*, 134 Fed. 64, 67 C. C. A. 190; *Rowell v. Smith*, (Wis.) 102 N. W. 1.

Our statutes and decisions provide two ways of subjecting a stockholder to liability—one by bill in equity (Code 1896, § 823), and the other by garnishment (Code 1896, § 2182). In this case the judgment creditor first proceeded by garnishment. Since the enactment of our statute permitting the process by garnishment against a stockholder, without regard to whether a suit could be maintained by the corporation, the issue is the same, whether the proceeding be by garnishment or in equity, to-wit, "whether the garnishee is indebted to the debtor in such form as that the debt can be condemned to the satisfaction of the plaintiff's judgment."—*Randolph v. Little*, 62 Ala. 396. The plaintiff, having brought the parties in by garnishment, had the right to a full investigation as to the liability of the garnishees, and, if he chose not to contest the answer, or to take other means within the time prescribed by statute to determine the very issue for which he had summoned them, but permitted the matter to go to a final determination on the merits simply on the answer of the garnishee, the matter of indebtedness and liability vel non is res adjudicata and cannot be again litigated in this proceeding between the same parties. That would be speculating on the chances, as stated in cases supra.

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We take the statements in the agreement of the parties as to the disposition of the garnishment proceedings, not only because this is the case made out by both parties to this case, but because the seeming discrepancy between said agreement and the transcript from the record of the court may be explained by the fact that the transcript does not purport to set out all the orders and decrees in said cases, but only those referred to as exhibits in the agreement, and it is not an unusual custom in some of the court to retain the style of the case just as it was at first, notwithstanding some of the garnishees may have been discharged. It appears from the agreement on file in this case that the complainants sued out garnishments against the respondents, Dimmick, Baldwin, and Craik, that answers were filed denying indebtedness and, no contest being filed, said garnishees were discharged, December 23, 1897, and, by consent said order was set aside on December 30, 1897, a motion was made to require them to answer orally, which was refused, and the garnishees discharged again. On appeal this judgment was reversed, and the cases restored to the docket, and at the November term, 1898, the garnishee Craik was discharged "with the consent of the plaintiff." Dimmick and Baldwin answered orally, were examined and cross-examined on all the matters pertaining to their liability, and there was a judgment of the court discharging the garnishee Dimmick, which judgment was affirmed by this court. A paper was filed contesting the answer of Baldwin, who moved for his discharge, and his motion being overruled, Baldwin appealed to this court, and the appeal was dismissed because no final judgment had been rendered, and on May 28, 1900, the plaintiff took a nonsuit in the cause against Baldwin as garnishee. As between plaintiff and the garnishee the judgment of discharge is *res adjudicata*.—Rood on Garnishment, §§ 202, 211; *Henderson v. Hall*, 134 Ala. 455, 510, 511, 32 South. 840, 63 L. R. A. 673. From what has been said it will appear that the court holds that the plea of *res adjudicata* should have been sustained as to the garnishees Dimmick and Craik; but a dismissal of a suit, by taking a nonsuit,

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is not a judgment on the merits.—*Beadle v. Graham's Adm'r*, 66 Ala. 99. Hence the plea of *res adjudicata* was properly held to be not sustained as to the garnishee Baldwin. As said by this court in this case, after the nonsuit, "he stands now, as to his legal rights, where he stood before the garnishment."—*Baldwin v. Roman*, (Ala.) 31 South. 596.

As to the defendants J. W. Dimimck and G. W. Craik the decree of the court is reversed, and a decree will be rendered sustaining the plea of *res adjudicata*; and as to the defendant A. M. Baldwin the decree of the court is affirmed.

Reversed and rendered in part, and in part affirmed.

WEAKLEK, C. J., and HARALSON and ANDERSON, JJ., concur. TYSON, J., not sitting. DOWDELL and DENSON, JJ., dissenting on the question of *res adjudicata* as to Dimmick and Craik, being of opinion that the doctrine of *res adjudicata* does not apply in case of discharge of a garnishee on answer when there has been no contest of such answer.

Dickinson v. Traphagan.

Bill by Contract Creditor to Require Stockholder of Insolvent Corporation to Pay Amount Due on Subscription.

(Decided April 28th, 1906. 41 So. Rep. 272.)

1. *Corporation; Stockholders; Liability; Action to Enforce; Nature and Form.*—Equity cannot entertain a bill by a simple contract creditor to require a stockholder of an insolvent corporation to pay balance due on subscription to stock under § 823 of the code 1896, this right belongs only to judgment creditors.
2. *Same.*—Acts 1903, p. 388, has no application to a bill filed by a contract creditor to subject a stock subscription to his claim.
3. *Same; Necessity of Judgment and Execution against Corporation;*

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Insolvency of Incorporation.—A simple contract creditor may not maintain a bill to subject a stock subscription to his claim without first obtaining a judgment and a return of execution *nulla bona*, on the mere insolvency of the corporation.

4. *Same; Pleading; Bill; Sufficiency.*—A bill by a contract creditor to subject a stock subscription to his claim against a foreign corporation, which alleges that there was no person in the service of the corporation within the State, was insufficient and subject to demurrer; and was not the equivalent of an allegation of non compliance with the statute in not having a known place of business and an authorized agent, so as to show that it was impracticable to obtain a judgment.
5. *Same; Persons Liable; Married Women.*—The general statute imposing liability on shareholders of unpaid subscriptions includes married women, and they are not exempt by reason of coverture.

APPEAL from DeKalb Chancery Court.

Heard before HON. W. H. SIMPSON.

This was a bill filed by H. L. Traphagen to compel Gertrude H. Dickinson to contribute the value of the difference between the par value of her stock and the amount actually paid in by her towards the payment of complainant's claim against the Alabama Kaolin Company, an insolvent corporation. The allegations of the bill make complainant only a simple contract creditor. The other facts are sufficiently stated in the opinion.

GOODHUE & BLACKWOOD, for appellant.—The bill of complaint fails to show that under the laws of West Virginia respondent is liable for the difference between the value of the real estate conveyed to the corporation and the par value of her stock.—*Coyt v. Gold Amalgamating Company*, 119 U. S. 343; *Hospes v. N. W. Car Co.*, 15 L. R. A. 430; *Fort Madison Bank v. Alden*, 129 U. S. 378; *Bickley v. Schlag*, 46 N. J. 533; *Young v. Erie Iron Co.*, 64 Mich. 111. The complainant is not shown to be a judgment creditor of the corporation.—§ 823. code 1896; 10 Cyc. 728; *Tarbel v. Page*, 24 Ill. 46; *Van Weed v. Winston*, 115 U. S. 228. The Alabama Kaolin Company is entitled to a trial to determine whether or not it is indebted to complainant before recourse can be had on its stockholders.—*Swan Land Company v. Frank*, 148 U. S. 612; *Scott v. Neeley*, 140 U. S. 113.

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HOWARD & HUNT, for appellee.—The constitution of West Virginia clearly defines the liability of a stockholder for his unpaid subscription to the capital stock.—10 Cyc. 678. An unpaid stock subscription is an asset of the corporation.—*Henderson v. Hall*, 134 Ala. 455. The acts of 1903 authorized simple contract creditors to marshal the assets of an insolvent corporation in a court of equity.—*McDonald v. Alabama G. L. Co.*, 85 Ala. 401; *Spence v. Shaphard*, 57 Ala. 598. That a stockholder is liable for his unpaid stock subscription is primary and absolute, and it is unnecessary to proceed against the corporation.—*McDonald v. Alabama G. L. Ins. Co.*, *supra*; 10 Cyc. 727. A general statute imposing individual liability upon shareholders includes married women, and they are not exempted by reason of coverture.—10 Cyc. 632.

ANDERSON, J.—This bill is filed by the complainant, a simple contract creditor of an insolvent corporation, to compel the respondent to pay what is due upon her subscription and to subject the same to payment of his debt. Section 823 of the code of 1896 confers this right in a court of equity only upon judgment creditors.

Acts 1903, p. 388, has no application to a bill of this kind, but simply permits the marshaling of the assets of an insolvent corporation for the payment of creditors. The bill in the case at bar is in no sense such a bill as is contemplated by said act. The complainant, having no right under the statute to maintain this bill, is relegated to the common law, and, if he cannot proceed thereunder, has no standing in the chancery court. "No facts will be sufficient to excuse the creditor from obtaining a judgment at law against the corporation, except facts which are such as to make it impracticable for him to obtain such a judgment." The mere insolvency of the corporation does not relieve the complainant from first obtaining a judgment and its being returned *nulla bona*.—10 Cyc. 728; *Tarbell v. Page*, 24 Ill. 46; *Van Weed v. Winston*, 115 U. S. 228. 6 Sup. Ct. 22, 29 L. Ed. 384.

An attempt is made in the bill as amended to excuse a failure to obtain a judgment against the corporation by

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averring that the officers are nonresidents of the state, "and that there is no white person or any person in the service or employment of said corporation in Alabama." Section 232 of the constitution of 1901 provides that "no foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Article 16, c. 28, p. 445, code of 1896, makes provision for the requirements of the constitution in this respect and prescribes the method of a compliance therewith. It would therefore seem that the complainant could have obtained service if the law had been complied with by the corporation, and there should be an averment of the noncompliance therewith in order to show that the obtaining of a judgment was impracticable or impossible. This conclusion is not in conflict with the rulings of this court in the cases of *McDonald v. Ala. Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120; *Spence v. Shapard*, 57 Ala. 598. In those cases the bill was filed after a dissolution of the corporation. If the corporation had been dissolved, the creditor could not get service or a judgment in a court of law, and his only remedy was by a bill in equity. There is nothing in the bill here under consideration to indicate that the corporation has been dissolved, and, for aught we know, it is a going concern. The chancellor erred in overruling the second and third grounds of the demurrer.

The constitution of West Virginia clearly defines the liability of a stockholder for his unpaid subscription to the capital stock and is an affirmation of the common law.—10 Cyc. p. 678, §§ 1, 2. The first ground of the demurrer was properly overruled.

"A general statute imposing an individual liability upon the shareholders includes married women, and, unless they are specially mentioned by its terms, they are not exempted by reason of their coverture."—10 Cyc. p. 682, § 11; *Reciprocity Bank Case*, 22 N. Y. 9; *Dreibach v. Price*, 133 Pa. 560, 19 Atl. 569. The fourth ground of the demurrer was properly overruled.

[Sellers v. Farmer.]

For the error above pointed out, the decree of the chancellor is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

Sellers v. Farmer.

Bill for Specific Performance.

(Decided May 17th, 1906. 41 So. Rep. 291.)

1. *Equity; Pleas; Joinder of Issue.*—Under chancery Rule 76 it is not necessary to note pleadings in the submission of a cause; and in the absence of demurrer or replication issue will be treated as taken on pleas in the answer.
2. *Appeal; Presumption in Favor of Decree.*—Where pleas have been proven, it will be presumed in favor of the decree that it was based upon the pleas and proof of them, although no mention is made of the pleas in the decree.
3. *Same; Rulings on the Evidence.*—Where the opinion of the chancellor states that the respondent's objection to complainant's testimony are well taken and must be sustained, but no ruling thereon is shown by the decree, assignments of error relating to the ruling on such testimony cannot be considered.

APPEAL from Henry Chancery Court.

Heard before HON. W. L. PARKS.

This was a bill filed by the appellant to enforce specific performance of a contract alleged to have existed between appellant and appellee. The chancellor denied the relief prayed and complainant appeals.

WILLIAM C. OATES and WILLIAM L. MARTIN, for appellant.—There was no submission on the pleas which was a waiver of them.—*Adair v. Feder*, 133 Ala. 620; *Holloway v. Southern B. & L. Asso.*, 136 Ala. 160; *Johnson v. Common Council*, 127 Ala. 244. By proceeding to trial without mentioning the pleas was a waiver of them.—

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Daughdrel v. Helm, 53 Ala. 62; *Harper v. Campbell*, 102 Ala. 342.

The matters of record referred to by the witness Oates were merely incidental or collateral, not falling within the rule requiring the highest and best evidence.—*East v. Pace*, 57 Ala. 521; *Street v. Nelson*, 67 Ala. 504; *Foxworth v. Brown*, 120 Ala. 59.

T. M. ESPY, for appellee.—The special pleas were not tested by complainant, and he will be held to have taken issue on them, and being proven, was entitled to the decree rendered.—*Tyson v. Decatur Land Co.*, 121 Ala. 414; *Johnson v. Common Council*, 127 Ala. 244; *Stein v. McGrath*, 128 Ala. 175; *Mylam v. King*, 139 Ala. 319. It is clear that under rule 76 of chancery practice that pleadings need not be noticed by the register in order for the court to consider them.—*Jones v. Babylon*, 45 Ala. 161; *Carter v. Thompson*, 41 Ala. 381; *Reese v. Baker*, 85 Ala. 474.

DENSON, J.—Bill to enforce the specific performance of a contract to convey lands. From a decree of the chancellor denying the relief prayed for the complainant prosecutes this appeal. In his answer to the bill as it was last amended the respondent as a defense to the bill incorporated independent special pleas. This he might well do under the statute and reap the benefits that might flow from proof of the pleas, the same as if they had been pleaded separate and apart from the answer.—Code 1896, § 699; *Stein v. McGrath*, 128 Ala. 175, 30 South. 792; *Mylin v. King*, 139 Ala. 319, 35 South. 998; *Tyson v. Decatur Land Co.*, 121 Ala. 414, 26 South. 507.

But it is insisted by the appellant that issue was not joined on the pleas, and therefore that the principle established in the cases above cited cannot avail the defendant anything, although the proof may establish the averments made in the pleas. The insistence that issue was not joined on the pleas is based solely on the proposition that the pleas are not mentioned in the note of submission. Rule 76 of the chancery court provides that:

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"On the hearing of a cause, the court can dispense with the reading of the pleadings and proofs; and in that case, the complainant's counsel must state the case made by the bill, and the defendant's counsel the case made by the answer. The complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony of which the register must take a note; and then that of the defendant must be offered, and noted by the register; to which the complainant in like manner, must offer his rebutting testimony. Any testimony not offered in this way, and noted by the register on the minutes, must not be considered as any part of the record, nor considered by the chancellor. Counsel on either side in the course of their arguments can read any portion of the pleadings or proofs. A hearing on bill and answer, motion, demurrer, exceptions, or appeal shall conform as far as applicable to this rule." It is obvious that the rule excludes the idea that it is necessary to make a note of the pleadings at all. The pleadings are a part of the record, and the court may refer to the record, and any part of it, without any note being made of it. But the evidence, to become a part of the record, must be, not only noted in the note of submission, but noted by the register on the minutes. By the pleas being incorporated in the answer, as they were, the complainant's attention was called to them, and if he deemed them sufficient he should have had their sufficiency tested in the appropriate way. Not having done so, the complainant must be held to have silently taken issue on the pleas.—*Tyson v. Decatur Land Co.*, 121 Ala. 414, 26 South. 507; *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 18 South. 292, 56 Am. St. Rep. 38. It is true that in the decree no mention is made of the pleas or that the decree is particularly rested upon the issue presented by the pleas. Nevertheless, as the decree was in favor of the respondent, if the pleas are proved, to sustain the decree of the court we would presume that the decree was based on the pleas and proof addressed to them. We concur with the chancellor, as expressed in his opinion, that

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the testimony establishes the pleas; and the decree dismissing the bill is correct, whether the pleas are in the abstract good or bad. See authorities *supra*.

The grounds in the assignment of errors which relate to the objections to testimony cannot be considered, as it does not appear from the decree that any ruling was made with respect of objections to evidence. It is true in the chancellor's opinion he states that objections made by the respondent to complainant's testimony are well made and must be sustained; but this is merely the expression of an opinion, and, not being embodied in the decree, cannot be reviewed.

We find no error prejudicial to the appellant in the record, and the decree appealed from is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

Gillespie, *et al.*, v. Gibbs, *et al.*

Bill to Enjoin Ultra Vires Acts of Municipal Corporation.

(Decided June 13th, 1906. 41 So. Rep. 868.)

1. *Municipal Corporations; Ultra Vires Acts; Injunction; Parties.*—An alderman of a town may, in his individual capacity, as a tax payer of the town, join with other tax payers as complainants to enjoin the ultra vires acts of the municipal corporation and its officers.
2. *Same; Parties Defendant.*—The officers of a municipal corporation engaged in the doing of ultra vires acts on behalf of the corporation are proper parties defendant to a bill to enjoin such acts, and the municipal corporation is a necessary party defendant.
3. *Same; Defenses.*—The fact that after suit filed the corporation and its officers discovered their error and rescinded the order under which the acts were directed to be done and abandoned

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the illegal scheme, does not afford cause for dismissing a suit properly filed to enjoin such threatened ultra vires act, even though by amendment to the bill such matters are set up as having occurred.

4. *Same; Bill; Amendment.*—Where the town abandoned its project of purchasing an additional lot for school purposes and stopped paying out corporate funds to repair the school house, after bill had been filed to enjoin such acts, but the municipal authorities immediately rented for the town hall a portion of the same school house for a period of five years and paid the rent for the whole term in advance, which was a mere subterfuge to avoid the injunction, an amendment setting up these facts did not destroy the equity of the bill.

APPEAL from Cullman Chancery Court.

Heard before HON. W. H. SIMPSON.

This bill was filed by F. A. Gillespie, and others, citizens and tax payers of the town of Hanceville, against Gibbs and others, as mayor and aldermen of said town, to enjoin the expenditure of public funds towards the building and equipping of a school house. The town of Hanceville was not made a party respondent. Burkhart was a member of the board of aldermen at the time of the filing of the bill, and was made a party complainant. The other facts are sufficiently stated in the opinion of the court.

BROWN & KYLE, for appellant.—Municipal corporations can exercise only such power as are expressly granted in their charters, and such as may be necessary and proper in order to carry such express or incidental powers into effect.—*City of Eufaula v. McNab* 67 Ala. 59; *City Council v. Plank Road*, 31 Ala. 76; *Mayor v. Yuille*, 3 Ala. 157. All acts therefore, which are not authorized by these principles are ultra vires the corporation.—*Meyer, et al. v. Ensley*, 37 So. Rep. 639. The acts of the common council are the acts of the town when and only when relating to a subject over which it has jurisdiction; otherwise, it is the acts of the individual.—20 A. & E. Ency. of Law, pp. 1209-1210. The original and amended bill constitute but one bill, and that bill speaks

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as of the filing of the original bill as to the rights of complainant.—*Taunton, et al. v. McInnish*, 46 Ala. 619; *Adams v. Phillips*, 75 Ala. 416; *Bracken v. Newman*, 121 Ala. 311. The amendments to the bill were germane to the purposes of the bill and were improperly stricken.—*McMinn v. Karter*, 123 Ala. 507. The courts of equity will at the suit of tax payers enjoin the officers of a municipal corporation from making illegal contracts for misappropriating public funds.—*Inge v. Mobile*, 135 Ala. 187; *Allen v. LaFayette*, 89 Ala. 641. Burkhart, although a member of the council, was a proper party complainant. The action is against the individual and not against the corporation and the corporation was not a necessary party.—*Sanche v. Webb*, 97 Ala. 111.

GEORGE H. PARKER, for appellee.—Burkhart is a party improperly joined as a party complainant, as he was a member of the body whose wrong doing is sought to be enjoined.—10 Ency. P. & P. p. 906. The corporation was a necessary party.—10 Ency. P. & P. p. 914; *Powers v. Decatur*, 54 Ala. 214. Upon the admission of the amendment to the original bill showing that the respondents are not carrying out the acts enjoined, the injunction should be dissolved and the bill dismissed.—*Steiner v. Scholze*, 105 Ala. 607; 2 High on Injunctions, § 1494; P. & P. p. 1038. The town had the authority to do and perform the acts complained of.—*Mitchell v. The City of Gadsden*, 109 Ala. 390; *Allen v. LaFayette*, 89 Ala. 641. The amendments were clearly departures.—10 Ency. P. & P. p. 96.

TYSON, J.—This is the case of a bill filed by certain taxpayers of the municipality of the town of Hanceville, one of whom was an alderman of the said town, against the intendant and the other aldermen, to enjoin ultra vires acts of the corporation. The particular act complained of was the application of corporate funds to the repair and completion of school property owned by the Hanceville school district situated in the town, and the purchase of an additional lot for the said school. After

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an injunction had issued, the town authorities, recognizing the want of power to do the act complained of, revoked the orders under which they were directed to be done, and apparently abandoned the project, but immediately afterwards rented for a town hall a portion of the same schoolhouse for five years, and paid the rent for the whole term in advance, amounting to \$250. Thereupon amendments to the bill were interposed, setting up these facts, alleging that they were a mere subterfuge for avoiding the injunction, and making new parties. Motions were made to strike the amendments as departures, to dismiss the bill for want of equity, and to dissolve and discharge the injunction, and at the same time demurrers were interposed to the whole and to parts of the bill. The chancellor dissolved the injunction, struck the amendments, sustained the demurrers, and, finding in his decree that the bill could not be amended so as to give it equity and that complainants made no effort to amend, dismissed the bill. The appeal is brought by the complainants below to reverse this decree.

We do not doubt the right of an alderman to join in his individual capacity as a taxpayer of the town with the other complainants to enjoin ultra vires acts by the town authorities and their officers. One does not lose his character and capacity and rights as a citizen by becoming an officer of the town in which he lives, and he by no means complains of himself by joining with others in the institution of a suit in his capacity as a citizen and taxpayer against the corporation and its officers other than himself. Nor do we doubt that the officers of the corporation engaged in the perpetration of ultra vires acts in behalf of the corporation are proper parties defendant to a suit to enjoin such acts, or to correct them. In such case there may be a personal liability in favor of the corporation, to be imposed upon the officers engaged in the illegal acts complained of. Nor does the fact that, after a suit has been instituted, complaining of ultra vires acts about to be done, the corporation and its officers discover their error and revoke the orders under which the acts were directed to be done, and abandon the

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illegal scheme, afford any cause for the dismissal of a suit properly instituted to prevent the acts complained of, although such matters be set up as amendments to the bill as having occurred.--*McMinn v. Karter*, 123 Ala. 502, 26 South. 649. Such acts of recantation by the corporation and its officers, as stated in the case cited, strengthen the case made by the original bill, and confirmed the title to relief therein alleged, and by no means have the effect of destroying the equity of the original suit. The amendment in this case, while it might not give the complainants any right to relief against the acts complained of therein, in reference to the renting of a portion of the school house as a town hall, on the ground that the municipal authorities have a legislative discretion in reference to such matters, which cannot be inquired into, and particularly so in a case of this kind, instituted for a different purpose, did not interfere with the equity of the original bill to have the judgment of the court in striking the amendments, which is necessarily an act antecedent in its nature to the dismissal of the bill, would certainly leave the bill unimpaired by the amendments.

But there is a defect about the original bill which seems to render the sustaining of the demurrer thereto unobjectionable. The suit is in reference to corporate property and alleged corporate conduct. Ordinarily the corporation itself would be the proper complainant to bring such suit, but, being under control of officers who were united in the project of misapplying the corporate funds, the right to prevent such injuries to the corporation by the institution of suits such as this by the taxpayers of the town is undoubted, and it is fully recognized; but the municipal corporation in its corporate capacity is a necessary party to the proceeding, when it is not a plaintiff. When the suit is one to vacate a charter and restrain persons from acting as a corporation, it was improper, prior to section 3423 of the code of 1896, to make the alleged corporation a party defendant, since it would be an admission of its existence.—*State ex rel. Sanche v. Webb*, 97 Ala. 111, 12 South. 377, 38 Am. St. Rep. 151. But when the suit is in behalf of a corporation, and to

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preserve its property against illegal acts done in its name by its officers, the corporation as such is certainly an indispensable party. The analogy in such cases between municipal corporations and private corporations, when suits are instituted in behalf of the latter by corporators, is perfect.—10 Cyc. pp. 995, 996, and authorities there cited; 2 Dillon on Corporations, §§ 915, 916. Though the inhabitants of a town are, as stated in *City of Eufaula v. McNab*, 67 Ala. 589, 42 Am. Rep. 118, the corporators, and the officers are but public agents of the corporation, the corporation itself is the legal owner of all the property standing in its name, as much as a private corporation, and neither can be dispensed with as a party defendant to a legal proceeding such as this.—Ency. Pl. & Pr. vol. 10, p. 914; Id. vol. 14, p. 224; 36 Cent. Dig. col. 3126; *New Orleans M. & C. R. R. Co. v. Dunn*, 51 Ala. 128; *Turner v. Cruzen*, 70 Iowa, 222, 30 N. W. 483; *Moore v. Held*, 73 Iowa, 538, 35 N. W. 623.

The demurrer in this case on the ground of the absence of the corporation as a party to the suit was distinctly made, and was sustained in term time, and the complainants, by not offering to amend, stood by their bill. There was thus no alternative left but to dismiss the bill, since "no court can adjudicate directly upon a person's right without the party being either actually or constructively before the court."—*Mallow v. Hinde*, 12 Wheat (U. S.) 130, 15 L. Ed. 158; 3 Brick. Dig. 373. As this point is decisive, and must result in the affirmance of the decree of the lower court, it is unnecessary to consider other matters in the case.

The decree of the lower court is therefore affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

[Universalist Convention of Alabama v. May.]

Universalist Convention of Ala. v. May.

Bill to Acquire Control of Trust Funds.

(Decided May 31st, 1907. 41 So. Rep. 515.)

Charities; Cy Pres Doctrine.—The doctrine of cy pres, as recognized and administered by the English courts of chancery in reference to trusts, being, as it was, based upon the prerogative power of kings, is not recognized by the Alabama courts.

APPEAL from Houston Chancery Court.

Heard before HON. W. L. PARKS.

The case made by the bill is that the appellant is a corporation organized under the laws of Alabama and engaged in the work of propagating a religious doctrine known as Universalism, and in the building and organizing of churches within said state for the purpose of furthering said work and enabling them to carry on the same in a more efficient manner; that all of such churches are the property of the state organization; that in January, 1897, Green conveyed to Granger & Price, as trustees of the Universalist Church of the town of Dothan, a certain lot, which was sold upon order of this court at public outcry, and the sum of \$750 was realized from said sale, the same being net after payment of costs and expenses, and that the same is now in the hands of the register of this court; that said trust estate has failed of execution because there is not now and never has been a Universalist Church organized in Dothan, and the said estate is entirely wanting in a cestui que trust, and that there is but one Universalist Church organization in Alabama, this plaintiff, and as such all church property becomes the property of and belongs to the state organization; that it was contemplated by the grantors in said trust deed at the time of its execution that the beneficiary, the church at Dothan, should become a part

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of the Universalist General Convention, or the complainant in this case, which is one of its subdivisions, and that complainant should become the owner and control the property so conveyed for the establishment of such a church at Dothan, but that after diligent effort to organize and establish a church of this faith and order at Dothan they have failed; that unless the chancery court grants relief in this behalf, the trust estate will continue dormant and unused, and the purposes for which the same was created will fail; that after making the conveyance above set out the said Granger and Price died, and that no trustee was appointed or elected in their place until the appointment of the respondent herein as trustee by the register of this court; and that said respondent is the sole trustee of said trust estate. The bill contained an offer to make bond for the fund above referred to in double its amount, to be approved by the register of this court and payable to this respondent, and conditioned upon the return of the said fund whenever a Universalist Church is organized in Dothan, Ala. The prayer of the bill was that complainant be entitled to have the use and custody of the fund in the hands of the register of this court, and that the said trust estate has failed, in that there is no beneficiary therefor, and that the property conveyed to said trustee, or the proceeds thereof, be delivered to orators, to be used as to them may seem right and proper. There were demurrers and motions to dismiss for want of equity. From this decree, this appeal is prosecuted. There was also motion to dismiss the appeal in this cause, which was overruled.

R. D. CRAWFORD, for appellant.—Under the allegation of the bill complainants are most nearly like the bequest to which the trust fund is specially dedicated and therefore the trust fund in the hands of the register should be transferred to the care, custody and control of complainant.—5 A. & E. Ency. of Law, p. 939; 8 Ib. p. 534.

ESPY & FARMER, for appellees.—Houston county never having been added to or made a part of the southeastern

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chancery division, except by the act of Feb. 28th, 1903, (Acts 1903, p. 108), which act is a local act and unconstitutional for want of notice, the proceedings in this case are void and the cause should be dismissed.—*Lancaster v. Gafford*, 37 So. Rep. 108; *Kidd v. Burke*, 38 So. Rep. 241. The doctrine of cy pres as administered by the courts of England has never been recognized in Alabama.—*Williams v. Pearson*, 38 Ala. 299.

DOWDELL, J.—The complainant by its bill invoked an application of the doctrine of cy pres in the application of a trust. Upon this theory, and this alone, is the bill filed. The bill was demurred to by the respondent, assigning a number of grounds, which demurrer was sustained by the chancellor, and from his decree the present appeal is prosecuted.

Apart from any consideration of insufficiency in the averments of the bill, as pointed out by the demurrer, it is enough to say that the theory upon which the bill is filed finds no support in the former adjudications on the subject by this court. The doctrine of cy pres, as recognized and administered by the English Court of Chancery, was based upon prerogative power of the king, and the principle, therefore, is by us, under our institutions, without recognition.—*Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299; *Johnson v. Holifield*, 79 Ala. 423, 58 Am. Rep. 596. There was no error in sustaining the demurrer to the bill, and the decree of the chancellor will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

[Harton v. Town of Avondale.]

Harton v. Town of Avondale.

*Bill for Supersedeas and Certiorari to the Authorities
of the Town of Avondale to Stay Further
Proceedings as to Certain Assessments
and to Declare the Same Null
and Void.*

(Decided July 6, 1906. 41 So. Rep. 934.)

1. *Exceptions, Bills of; Signing; Time.*—The judgment in this case was rendered Jan. 31st, 1906, and the bill of exceptions signed Nov. 13, under orders by the court extending the time of signing to Dec. 1st, 1905. Held, that the signing was within six months of the adjournment of the term at which the judgment was rendered and within the time fixed by the trial judge under orders extending the time, and that the bill was signed in time.
2. *Constitutional Law; Due Process; Special Assessment.*—The assessment of the cost of improvement against lands abutting in the immediate vicinity of the improvement, being a part of the taxing power of the government, cannot be said to be without due process of law, because there is not a provision for a regular investigation by court and jury in order to ascertain the amount of burden that shall be placed upon the property.
3. *Municipal Corporations; Street Improvement; Special Assessment; Method of Imposition.*—The determination of the proportion of the burden of the cost of street improvement, that shall be borne by the abutting property and by the public, being a matter of legislative discretion, and the legislature having determined that the assessment shall be made in a particular manner, it will be presumed that the legislature has determined, that that is the proper measure of the benefits received.
4. *Same; Assessment of Benefit.*—The rule of assessment that the cost of the improvement must be assessed in proportion to the amount of benefits accruing to the property owner means simply that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners, and not that one owner should not be charged in excess of actual benefits received.
5. *Same; Constitutional Provision; Instruction.*—§ 223 constitution 1901 merely fixes the limit beyond which assessments for municipal improvement on abutting property shall be void, and

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authorizes the courts to examine the matter and determine whether or not such constitutional limit has been transcended; and such provision has no application to the manner in which the assessment is proportioned, whether by the front foot, or otherwise.

6. *Same; Charter Provisions;; Validity.*—The charter of the city of Avondale (Acts 1894-5, p. 139) does not violate § 223, constitution of 1901.
7. *Same; Review.*—Under the provisions of the charter of Avondale the property owner against whom the assessment is made, if not satisfied with the action of the board of assessment, (in this case the city council) may remove the matter by certiorari to the city or circuit court, and have the matter tried *de novo*.
8. *Same; Apportionment of Cost.*—Section 12 of the Avondale city charter declares that not more than one-third of the cost of street improvements shall be assessed against the owners of abutting property, not including sidewalks. Held, the city was without authority to assess one-third of the cost of the entire street improvement to the owners on each side of the street, as such assessment would require a payment by the abutting property of two-thirds of the cost of the work.
9. *Same; Cost of Guttering.*—Section 12 of the Avondale city charter does not authorize the assessment of the entire cost of guttering against the property abutting on the street.
10. *Same; Authority to Improve Streets; Character; Delegation.*—The authority granted the city of Avondale and its council to grade and pave streets and sidewalks is legislative in character, and it cannot delegate to any other official or committee to determine the kind and character of the improvements. The city council must ascertain and determine this matter.
11. *Same; Ratification.*—Where the ordinance providing for the improvement of a street, delegated to the street committee the duty of having the streets graded, guttered, curbed and macadamized, and left the specifications and material to the judgment of the street committee, and after levy of an assessment the work was accepted by the city council, such acceptance constituted the entire proceedings, the act of the city council, and the assessment was not void because the specifications and material were left in the first instance to the street committee.
12. *Same; Method of Levy; Assessment.*—Section 223, constitution of 1901, places but one limit on street improvement assessment, and an assessment is not void under it, solely because each lot was assessed on the basis of the cost of the work done in front of it, instead of first ascertaining the entire improvement cost, and apportioning the same among the abutting owners.

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APPEAL from Birmingham City Court.

Heard before HON. C. W. FERGUSON.

This bill was filed by the appellant against appellee, reciting that certain street improvements had been made abutting her property, and that the costs of said street improvement had been assessed against her property, without regard to the benefits accruing from said improvement to her property, and greatly in excess of the value derived from said improvement or the benefits accruing to the property therefrom, and alleging, also, the acts of the general assembly under the authority of which the town of Avondale was making these assessments.—Acts 1894-95, p. 137. The prayer of the bill is that writs of supersedeas and certiorari be issued from this court, directed to the mayor and aldermen of the town of Avondale, commanding them to “stay all further proceedings and to send forthwith a certified copy of the entire proceedings and records to this court, and that upon consideration by this court of said proceedings the said assessment shall be declared null and void and of no effect.” On the final hearing of the cause the trial court found the issues in favor of the defendant, and entered a judgment for the amount of the original assessment, plus 8 per cent. interest, and also adjudged that the judgment should be a lien upon the lots of the appellant. From this judgment she appeals. There was motion to dismiss bill of exceptions, because not signed in time, the facts concerning which sufficiently appear in the opinion.

LEADBEATER & JOHNSTON, for appellant.—The successful prosecution by the petitioner of his writ of certiorari reviewing the proceedings of Avondale in the matter of improvement assessments must result in an order quashing and annulling the levy made by the municipality.—Acts 1894-5, p. 137, § 12; *Fore v. Fore*, 44 Ala. 478; *Ex parte Madison Turnpike Co.*, 62 Ala. 93.

A charter or ordinance which arbitrarily declares that the unascertained whole cost of a local improvement shall be assessed against abutting property without reference to the special benefits is unconstitutional and void.

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—Mayfield's Digest, vol. 5, p. 697, and note; § 223 constitution of Ala. (1901); *City Council v. Foster*, 133 Ala. 587; *City Council v. Birdsong*, 126 Ala. 632; *Harlan, J.*, in *French v. Barber Asphalt &c. Co.*, 181 U. S. 324.

Curbing and guttering are not parts of the sidewalk but of the street and no greater per cent of their cost can be assessed against abutting property than the charter authorizes in case of streets.—*McNamara v. Estes*, 22 Iowa 246; *Warren v. Henley*, 31 Iowa 31; *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901; *Job v. People*, 193 Ill. 609, 61 N. E. 1079; *B. F. M. R. Co. v. Spearman*, 12 Iowa 112; *Buell v. Ball*, 20 Iowa 282; 25 Am. & Eng. Encyc. Law, (2d Ed.) p. 1180; *Palmer v. Way*, 6 Colo. 106.

To assess each lot with all or a fixed per cent. of the work actually done in front of it without regard for the work done, cost, benefit, or detriment to all or any of the other lots is a vicious and illegal method of assessment.—Cooley, Taxation 453, Chap. 20, § 53; *Id.* (2d. Ed.) 646, 647; 25 Am. & Eng. Encyc. Law (2d. Ed.) 1204 and ca. ci.; *McQuillin Munc. Ord.* p. 858, § 550; *City of Independence v. Gates*, 110 Mo. 374, 19 S. W. 728; *Diggins v. Brown*, 76 Cal. 318, 18 Pac.; Cooley Const. Lim. (6th Ed.) 250; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823; 81 Wis. 326, 51 N. W. 566; 34 Ohio St. 551; *Watkins v. Zwietusch*, 47 Wis. 513, 8 N. W. 35.

The dictum in *City Council v. Moore*, 140 Ala. 638, to the effect that a statute requiring an apportionment according to benefit would be fully complied with by an apportionment according to frontage is unsound and has been repeatedly discountenanced.—2 Dillon Munic. Corp. (4th Ed.), note to § 752, p. 914; *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736; *State v. Hudson*, 29 N. J. L. 104; *Ib.* 115, 266; *State v. Jersey City*, 40 N. J. L. 485; 38 N. J. L. 419; 39 N. J. L. 646; 37 N. J. L. 425; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; 40 Wis. 315, 52 Wis. 98; 55 Wis. 335, 369.

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Where the charter of a town confers upon the town council the power to cause its streets and sidewalks to be improved and to assess the cost thereof against abutting property, these functions cannot be delegated to any committee or other agency. The council must determine the place, the nature and plan of improvement, and the means, leaving to agents nothing more than the execution of the plans adopted by the council itself; and an ordinance which directs in general terms, the making of an improvement and referring the whole matter (e. g. letting contract, determining character of material, etc.) to "the street committee," is abortive and void and wholly inoperative as a foundation for the levy of special assessments against the abutting owners.—*Hydes v. Joyes*, 96 Am. Dec. 311, 4 Bush. 464; *Birdsall v. Clark*, (N. Y.) 29 Am. Rep. 105 and note; *McCrowell v. Bristol*, 20 L. R. A. 653, and note; *City of St. Louis v. Clements*, 43 Mo. 395; s. c. 52 Mo. 133; *Ruggles v. Collier*, 43 Mo. 353; *Foss v. City of Chicago*, 56 Ill. 354; *Moore v. City of Chicago*, 60 Ill. 243; *City of St. Joseph v. Wilshire*, 47 Mo. App. 125; *Thompson v. Schermerhorn*, 55 Am. Dec. 385.

So in regard to levying the assessment: the exercise of that power is judicial and cannot be delegated.—*State v. Town of Hoboken*, 32 Atl. 65, 58 N. J. L. 129; *Simmons v. Passaic*, 38 N. J. L. 60; *White v. Stephens*, 67 Mich. 33, 34 N. W. 255, *et passim*.

Where an ordinance authorizes a certain improvement to be made throughout a given district, the cost of which it is proposed to assess against the property abutting the improvement, it is illegal to levy the assessment when only a portion of the contemplated improvement has been made. The cost of the entire improvement as originally authorized must be ascertained and apportioned over the entire property. Otherwise, an assessment is premature and abortive.—*City of Independence v. Gates*, 110 Mo. 347, 19 S. W. 728; *City of St. Louis v. Clements*, 49 Mo. 552; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373; *Bellerue Imp. Co. v. Bellerue*, 39 Neb. 876, 58 N. W. 446.

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BOWMAN, HARSH & BEDDOW, for appellee.—On the authority of *Abercrombie v. Vandiver*, 140 Ala. 229, and cases therein cited, the court will not consider the bill of exceptions in this case, and as no error is assigned of record the cause must necessarily be affirmed.

SIMPSON, J.—It appears from the record that the judgment appealed from in this case was rendered on January 31, 1905; that there were orders by the presiding judge successively extending the time for signing the bill of exceptions to December 1st; and that the bill was signed November 13, 1905, which was more than nine months after the date of the judgment and beyond the next term of the court. Section 620 of the code of 1896 is imperative that “the time allowed for signing a bill of exceptions must not be extended beyond six months from the adjournment of court,” and rule 30, p. 1200, of the code of 1896, provides that the limit to which the signing may be extended by agreement is that it must be signed “before the next succeeding term of such court.” Appellee claims that as the time when the bill of exceptions was signed in this case was after the commencement of the next succeeding term, and more than nine months after the judgment was rendered, the same cannot be considered. According to the act establishing the city court of Birmingham there is but one term of court, “commencing on the first Monday in September and ending on the last day of the succeeding June.”—Acts 1888-89, p. 995. This court has heretofore held that the limitation as to the next term of court, under rule 30, applies only to extensions by agreement.—*Cooley v. U. S. Savings & Loan Ass’n*, 132 Ala. 590, 592, 31 South. 521. The extensions in this case were all by the presiding judge, and the bill was signed within six months after the adjournment of court, as shown by the act above cited.

But another question arises: The act establishing the city court of Birmingham provides that bills of exceptions “must be signed by the presiding judge of said court within sixty days after the day on which the issue

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or issues of fact to which such bill of exceptions relates was tried, unless the time for signing such bill of exceptions is extended by agreement of parties, or by order of the presiding judge, as now authorized by law respecting the signing of bills of exceptions in the circuit court."—Acts 1888-89, p. 1000. Section 617 of code of 1896 provides that "the court may, in term time, fix a time in which the bill of exceptions may be signed, and the judge may, in vacation, extend such time"; and section 619 provides that "the time fixed by the court or judge may be extended by agreement of parties or their counsel, and the time fixed by agreement may be extended by the judge in vacation." This court has heretofore held that the judge of the city court cannot extend the time for signing a bill of exceptions during the sitting of the court; but on the authority of the case of *Moss v. Mosely*, (Ala.) 41 South. 1012, this bill was properly signed.

The matter of local assessment for street improvements has been so completely "threshed over," as expressed in a previous decision of this court, that we will not attempt to go over the argument pro and con in the various cases, but will merely allude to the latest expressions from the supreme court of the United States and our own court. The substance of the latest decision of the supreme court of the United States on this subject is (*French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879) that it is not a violation of the 14th amendment to the constitution of the United States to assess a portion or all of the cost of the improvement against the lands abutting or in the immediate vicinity of the improvement. And the gravamen of the argument of the court is that this is a part of the taxing power of the government, and that from time immemorial governments have not pursued ordinary processes of courts in collecting taxes; hence the methods of enforcing these assessments cannot be said to be "without due process of law," because there is not provision for a regular investigation by a court and jury in order to ascertain the amount of burden that shall be placed upon the property. It holds, also, that the "question of benefits and the

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property to which it extends is of necessity a question of fact, and, when the legislature determines it in a case within its general power, its decision must, of course, be final." Page 338 of 181 U. S., page 630 of 21 Sup. Ct. (45 L. Ed. 879). Quoting from the case of *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, the court says: "In the absence of any more specific constitutional restriction than the general prohibition against taking property, without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed either like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.—Page 339 of 181 U. S., page 630 of 21 Sup. Ct. (45 L. Ed. 879). After giving analysis of the numerous cases on the subject, in most of which there seems to be a presumption that at some stage of the proceedings and in some way the property owner has had an opportunity to test the matter of the amount of benefits to his land by the improvement, the general conclusion is that it is a matter of legislative discretion to determine what proportion of the burden shall be borne by the property, and what by the public, and, while it is admitted that any assessment beyond the special benefits received by the improvement is, as to the excess, taking the property without due process of law, yet when the legislature determines that the assessment is to be made in a certain way, as by the front foot, the presumption is that the legislature has determined that that is the proper measure of the benefits received. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, is not opposed to the views of the court in this case, and explains that in that case the entire cost of opening the street was thrown upon the abutting property, which was "an act of confiscation," and that the legal effect of

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the decision was to prevent the enforcement of the particular assessment, and to let the village in its discretion make a new assessment "for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property (pages 344, 345 of 181 U. S.) page 63 of 21 Sup. Ct. (45 L. Ed. 879) ; and the court say: "It may be conceded that the courts of equity are always open to afford a remedy where there is an attempt to deprive a person of his life, liberty, or property without due process of law." The court then calls attention to the fact that in the case before the court the lots along the street in question were of equal value, similarly situated with regard to the street, of equal depth and all "substantially on the grade of the street." While it is the opinion of the writer that the dissenting opinion of Justices Harlan, White, and McKenna has the advantage of the argument, yet in what shall be said in this opinion our conclusions shall be based on the opinion of the court as the law of the land.

Our own court has followed this decision, and held that it is a matter of legislative discretion to determine whether property abutting on the streets will be benefited to the extent of the cost of paving the street along the front of such property, and to impose the cost upon the property, "apportioning the charges thereto according to the distance the several lots may front upon the street so paved"; the argument being, as in the *French-Barber Case*, that when the legislature determines that the assessment shall be made by the front foot the presumption is that the legislature has determined that that is the proper measure of the benefit received. Our court says, in reference to our case of *Mayor and Aldermen v. Klein*, 89 Ala. 461, 7 South. 386. 8 L. R. A. 369, which is held to be in harmony with our latest enunciation of the doctrine: "It is true that this cost was to be assessed on this property in proportion to the amount of the benefit accruing to the property owners; but this only meant that there should be some rule of apportionment of the whole charge, having reference to the benefit received by

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the respective owners, and not that no owner should be charged in excess of actual benefit received."—*City Council of Montgomery v. Moore*, 140 Ala. 650, 37 South. 294. The court says that the case of *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 South. 522, was based on "what was generally supposed, and what three of the judges of the supreme court of the United States yet believe, was the effect of that court's decision in the case of *Norwood v. Baker*."—*City Council of Montgomery v. Moore*, 140 Ala. 638, 37 South. 291.

As will be noticed, these decisions are based entirely on the construction of the fourteenth amendment of the constitution of the United States and section 24 Bill of Rights, Const. 1875, and upon the law as it stood before the adoption of our present constitution. It was while the *Norwood-Baker Case* in the United States supreme court and the *Birdsong Case* in our own court were generally supposed to be the law—the former declaring that an assessment beyond the benefits actually accruing to the abutting owner from the improvement is as to the excess a taking of property without due process of law (which principle, as before shown, is still recognized), and that the courts have a right to inquire into that fact; and the latter, resting upon the same principle, and declaring that "the guaranties for the protection of private property would be seriously impaired if it were established, as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country," and going on to affirm the right of the citizen, when such assessment is made, to show "that the sum so fixed is in excess of the benefits received"—that our constitutional convention of 1901 added to our constitution section 223, forbidding such assessments "in excess of the increased value of such property by reason of the special benefits derived from such improvements."

The conclusion is irresistible that, with the lights before them, the intention of our constitution makers was

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to fix this limit in our organic law beyond which any assessment should be void, and to authorize the courts to examine into the matter and determine whether or not the constitutional limit had been transcended. To hold otherwise would be to suppose that the makers of the constitution had taken the trouble to formulate and adopt an absolutely meaningless new section to the constitution. To say that assessments shall not be made beyond the benefits received, and yet that, when an assessment is made, either directly by the legislative action or by a rule prescribed by it which has no provision for inquiring into the benefits, is to conclusively presume that the benefits were ascertained, and that the assessment was not in excess thereof would render the constitutional provision absolutely inoperative. This constitutional provision has nothing to do with the manner in which the assessment is apportioned, whether by front foot or otherwise, but only fixes a limit beyond which it cannot go. It necessarily follows that the property owner has the right in some form and at some time to contest the fact as to the benefits accruing and to bring forward such testimony as he can produce on that matter. Any guaranty of the constitution would be but a brutum fulmen, if there were no tribunal in which the citizen could demand the enforcement of his right. It is true, as has been said, that it is often a difficult matter to ascertain accurately the extent of the benefit; but the courts have to pass upon many difficult matters, and the only result of that is that, in this, as in other matters in which absolute accuracy is unobtainable, much latitude must be allowed to the tribunals which pass upon the matter. It may be admitted, as stated by the supreme court of the United States, that it belongs to that class of rights which do not necessarily demand a regular jury trial. Nevertheless it must be passed upon in some way, and if the original assessment is not done under some proceeding in which the citizen has had an opportunity to produce evidence and have a legal determination of the matter, the courts afterwards can inquire into it and enforce his right. Being difficult to ascertain, the conclu-

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sions of the tribunals as to the benefits accruing will not be weighed with delicate scales, but some tribunal must act, or the constitution-protected citizen is as helpless as if he were the subject of a despot.

The provisions of the charter of the town of Avondale require the assessment against the abutting owners to be made "in proportion to the amount of the benefit accruing to such abutting owner."—Acts 1894-95, p. 139. While this is not exactly in the words of section 223 of the constitution, yet it does not violate that section. The assessment may be made in "proportion to the amount of the benefit accruing to such abutting owner," and at the same time not to be "in excess of the increased value of such property by reason of the special benefits derived from such improvement." The act makes provision for notice to the property owner when an assessment is to be made against his property, and authorizes him to appear and contest the assessment, and it authorizes the owner, if not satisfied with the action of the council, to remove the matter by certiorari up to the city or circuit court, "where the same shall be regularly submitted and tried as in other civil cases." This last expression shows that the intention of the statute was not that the circuit or city court should merely look into the proceedings before the council, and either quash or affirm the same; but the reference is evidently to cases brought up by appeal, and the expression "regularly tried as in other civil cases" evidently means tried *de novo*. So the act is not unconstitutional.

The act provides that "not more than one-third of the cost of such improvement * * * shall be assessed against the owners of abutting property," not including sidewalks.—Acts 1894-95, p. 139, § 12. The evidence in this case shows that each property owner was charged with one-third of the cost of the entire street, so that the owner on each side of the street was charged with one-third of the cost of the entire street, thus causing the property owners to pay two-thirds, in place of one-third, of the cost of the work. This was in plain violation of the provisions of the statute, and the court erred in sustaining the assessment thus made.

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As to the resolution of the board of mayor and aldermen, the evidence shows, that in addition each property owner was charged with the entire cost of the "sidewalks, curbing and guttering." While the curbing may be so constructed as to make it a part of the sidewalks, yet it is clear that the guttering is a part of the street proper, and not of the sidewalk.—*Job v. People*, 193 Ill. 609; 61 N. E. 1079; *Allman v. Dist. Columbia*, 3 App. Cas. D. C. 8, 17; *Wilson v. Chilcott*, 12 Colo. 600, 602, 603, 21 Pac. 901. Consequently it was erroneous to sustain the assessment against the property owner of the entire cost of the guttering.

Section 12 of the act (Acts 1894-95, p. 139) authorizes the mayor and councilmen to cause and procure the streets and sidewalks to be graded, macadamized, etc. The ordinance under which the work was done in this case authorized the street committee to have the streets "graded, guttered, curbed, and macadamized." The ordinance did not contain any specifications as to the kind of work that was to be done, the material to be used, or any other matter in regard either to the street or sidewalk. These matters seem to have been left entirely to the judgment of the street committee. It is a familiar principle of law that legislative authority cannot be delegated, and the authorities are clear to the effect that the authority granted to grade and pave streets and sidewalks is legislative, and that the amount of the improvement, its kind and character, must first be ascertained by the legislative body of the city, and not delegated to the engineer, the committee, or any one else.—*McQuillan*, Municipal Ordinances, § 86; *Hydes & Goose v. Joyes*, 96 Am. Dec. 311, and notes; *Birdsall v. Clark*, 29 Am. Rep. 105, and note; *McCrowell v. Bristol*, (Va.) 16 S. E. 867, 20 L. R. A. 653, and note; *City of St. Louis v. Clemens*, 43 Mo. 133; s. c. 52 Md. 133; *Ruggles v. Collier*, 43 Mo. 353; *Foss v. City of Chicago*, 34 Ill. 489; *Moore v. City of Chicago*, 60 Ill. 243; *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; *Thompson v. City of Boonerville*, 61 Mo. 282; 1 Dillon on Munic. Corp. (4th

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Ed.) § 96, p. 779, and note. The supreme court of the United States, however, in a case in which the city authorities authorized the mayor and chairman of the committee on streets to make a contract for doing the work, directing how the preparatory work should be done, and ordering the construction to be of one or the other several materials, but giving to the owners of abutting lots the privilege of selecting which, held that, "while it is true the council could not delegate all the power conferred upon it by the legislature, * * * it could do its ministerial work by agents," yet "there was no unlawful delegation of power. But, if there had been, the contract was ratified by the council after it was made."—*Hitchcock v. Galveston*, 96 U. S. 341, 348, 349, 24 L. Ed. 659. Under this authority we hold that the subsequent ratification constituted the entire proceeding, including the assessment, the act of the city authorities, and not a delegation of legislative power.

It is next insisted that this assessment is invalid because it is shown that each lot was assessed on the basis of the cost of the work done in front of it, and that the cost of the work done on the entire street was not first ascertained and the cost apportioned among the abutting owners. The act provides that "the expense thereof shall, after the completion of the same, be assessed upon the abutting owners of land or lots along and adjacent to the streets, alleys or sidewalks along which the work is done, in proportion to the amount of the benefit accruing to such abutting owner"; also that "after such work on any street, alley or sidewalk shall be completed in front of or abutting any land or lot owner, the said mayor and board of aldermen shall have the mayor to give the notice required, of the time and place when the meeting is to be held to consider and determine the amount to be assessed against the abutting owner." and the amount will then be determined."—Acts 1894-95, pp. 139, 140, § 12. There is high authority for the position that any assessment of the cost separately against each lot owner, based alone on the cost of the work abutting his property, is illegal and void.—*City of Independence v. Gates*, 110 Mo. 374, 19 S. W. 728; *Davis v.*

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Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563, and notes; Cooley on Taxation (2d Ed.) pp. 646, 647, and notes. But Judge Dillon, after referring to similar decisions, remarked: "Still it seems to the author difficult to find satisfactory and solid ground on which to discriminate the case, so as to hold that one is within the constitutional power of the legislature and the other is not."—2 Dillon's Municipal Corporation (4th Ed.) p. 922, § 753. Inasmuch as our constitution has placed the one limit which we have hereinbefore construed, and inasmuch as in conforming to that limitation the assessment must frequently not be uniform among the abutting owners along the street, and while we recognize that the duty rests upon the legislative department as far as possible to apply the principle of uniformity, yet we cannot say that this fact alone renders the assessment invalid.

For the errors mentioned the assessment in question was invalid, and the town of Avondale was not entitled to recover in this case. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

Folmar, *et al.* v. Lehman-Durr Co.

Bill by Appllee to Set Aside Voluntary Conveyances as a Fraud on Creditors.

(Decided April 28th, 1906. 41 So. Rep. 750.)

1. *Pledges; Assignment of Debt; Exhausting Collateral.*—Complainants assigned to one of respondents the note of B. but did not assign the collaterals held to the note, although it was expressly agreed that they would do so for the benefit of another respondent. Held, that under § 947 code of 1896, the complainants were required to exhaust the collaterals withheld before

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proceeding against the respondent for whose benefit it agreed to transfer the collaterals.

2. *Fraudulent Conveyances; Want of Consideration.*—A conveyance of land which expresses a consideration of one dollar and love and affection, made by a father to his children, is voluntary on its face, and void as to creditors of the grantor.
3. *Reformation of Instruments.*—In order to maintain a bill to reform an instrument it must be plainly alleged and clearly proven that the parties thereto mutually intended that it should be expressed in terms different from what it contained, and that this failure or difference of expression was the result of mistake or fraud.

APPEAL from Montgomery City Court.

Heard before HON. A. D. SAYRE.

Bill by the Lehman-Durr Company against George A. Folmar and others. From an adverse decree, defendants appeal.

The bill alleges an indebtedness of George A. Folmar to the Lehman-Durr Company of \$4,104.71, with interest thereon from April 4, 1896, and that the debt accrued prior to June 12, 1896. It alleges a sale and transfer of certain lands therein described to the other defendants for love and affection, and a recited consideration of \$1 and \$2. It also alleges that the grantees in the deed from George A. Folmar and wife are the children of the grantors, and that the conveyances are voluntary and made for the purpose of hindering, delaying, or defrauding complainants in the collection of their debts. The defendants answered, denying any indebtedness on the part of George Folmar, admitting the making of the deeds and that they were children, and denying that said conveyances were made to hinder, delay, or defraud creditors.

W. L. MARTIN and GUNTER & GUNTER, for appellant.—Lehman-Durr & Co., held collateral note of Beall & Costell as a security for the debt due by them. It would, therefore, be a fraud in them to withhold the collateral belonging to the firm for the debt of J. W. Beall.—*Hirschfelder v. Keyser*, 59 Ala. 338; *Tyree v. Lyon*, 67

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Ala. 1; *Hunt v. Clark*, 56 Ala. 19. The collaterals follow the debt for which they are pledged unless they are released by the party owing the debt and devoted to some other purpose.—§ 947, code 1896; *Hatch v. White*, 6209 Fed. Case; *Duval v. McGlosky*, 1 Ala. 734; 2 Randolph Commercial Paper, § 731. The cross bill avers that all the collaterals were transferred to Felix Folmar for the benefit of cross complainant, and that Folmar is a defendant to the cross bill and admits the allegation, so that the cross bill stands as if filed jointly by Felix and G. A. Folmar, or by Felix alone with G. A. Folmar as defendant. The admission of the party holding the legal title that the cestui que trust is entitled to recover obviates the necessity of proving the right of the cestui que trust.—*Broughton v. Mitchell*, 64 Ala. 210; *Blevins v. Buck*, 26 Ala. 292; *Nix v. Winter*, 35 Ala. 309; *Owen v. Bankhead*, 76 Ala. 143. Collaterals held for a debt are merely incidental to the debt and pass with the assignment, and this must be the case where there is an agreement to so transfer.—§ 947, code 1896; 2 Randolph on Commercial Paper, § 731; 3 Ib. § 1675; *Duval v. McClosky*, *supra*; *Hatch v. White*, *supra*. The retention of and refusal to account for the note for \$7,500.00 was in equity a conversion as against Felix and G. A. Folmar.—Authorities *supra*; *Romeo v. Newman*, 23 So. Rep. 496.

Concealing and withholding the collateral note was a fraud vitiating the note here sued on.—*Alabama Warehouses v. Jones*, 62 Ala. 550; *Cronie v. Hart*, 18 Grat. 739; *Saltinstall v. Gordon*, 33 Ala. 149; *Jordan v. Pickett*, 78 Ala. 331.

The cross complainants by their testimony establish their right to relief prayed for in the cross bill and the chancellor erred in not granting it.—*Orr v. Echols*, 119 Ala. 340.

THOMAS H. WATTS and J. M. CHILTON, for appellee.—George A. Folmar had no such interest in the reformation of the deed as to permit him to maintain the bill.—*McKay v. Broad*, 70 Ala. 378. Before the reformation

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will be decreed the allegations must be clear and satisfactory and the proof clear, exact and convincing.—*Campbell v. Hatchett*, 55 Ala. 548; *Turner v. Kelly*, 70 Ala. 85; *Mitchell v. Capital City*, 110 Ala. 584. The cross bill was subject to demurrers interposed.—*Lehman v. Meyer*, 67 Ala. 403; *McCou v. Ashurst*, 55 Ala. 607; *Gordon v. Ross*, 63 Ala. 363; *Loeb v. Thatcher*, 87 Ala. 458; *Caldwell v. King*, 76 Ala. 149. The cross complainant is not entitled to relief prayed as to the \$7,500.-00 note.—*Lehman v. Levy*, 69 Ala. 48; *Dunbar v. Smith*, 66 Ala. 490; *Coleman v. Hatcher*, 77 Ala. 217; *Young v. Hawkins*, 74 Ala. 370. The debt was absolutely lost to Lehman-Durr & Co., by the transfer.—*Clark v. Jones*, 95 Ala. 127; *Thornton v. Guice*, 73 Ala. 321. It requires something more than the existence of mere cross demand to give equity the right to set off one against the other.—*O'Neil v. Perryman*, 102 Ala. 522; *Tate v. Evans*, 54 Ala. 16; *Gafford v. Prausseau*, 59 Ala. 264; *Jones v. Brevard*, 59 Ala. 499.

ANDERSON, J.—The transfer of the debt passes to the transferee the right of the transferor in such security or property pledged.—Code 1896, § 947; Randolph on Commercial Paper, §§ 731, 1675; *Duval v. McLoskey*, 1 Ala. 734; *Hatch v. White*, Fed. Cas. No. 6,209.

Not only did the law give the respondent Felix Folmar the \$7,500 note held as collateral upon the assignment to him of the notes held by the complainant Beall & Coston, but the undisputed evidence is that it was expressly agreed that, when the notes which this bill seeks to enforce were executed, it was expressly understood that the complainants should not only assign to Felix Folmar the notes against Beall & Coston, but all collateral held by them to secure the indebtedness of said firm, for the benefit of George A. Folmar. That being true, a withholding of said collateral note of \$7,500 deprived the assignee of the benefit of a collateral to which he was entitled, and the complainant, having failed to transfer the said collateral note of \$7,500, is required to exhaust the same before seeking payment from Geo.

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A. Folmar of so much of the Beall & Coston debt as may be included in the indebtedness. If said collateral is sufficient to discharge the debt of Beall & Coston assumed by Geo. A. Folmar, then the complainant cannot come upon Folmar for same; but, if insufficient, then they would be entitled to a decree for what the collateral would lack of paying the debt, giving the complainant the benefit of the \$350 already realized by the assignee on the collaterals that were assigned.

It is needless to discuss whether or not the complainant, under a subsequent agreement with Beall, had the right to hold the firm's collateral for the individual debt of Beall, as the complainant's own evidence shows that, if such an agreement was made, it was secondary to the purpose for which the original note was hypothecated. Roman admits that the note was originally left with them to secure the indebtedness of the firm, and that Beall subsequently agreed that it should be held to secure his own debt, after the firm debt was paid. The fact cannot be doubted that when George A. Folmar gave the complainant his notes assuming the debt of Beall & Coston, and the firm notes were transferred to Felix Folmar, this \$7,500 was at that time held primarily as a collateral to secure the notes so assigned. Nor can there be but little doubt that the complainant at the time of the transaction claimed to hold it exclusively as a collateral to secure the individual debt of Beall. George A. Folmar testified that the transaction was with Wilkerson, the attorney of complainant, and introduced a writing executed at the time, reciting, "This note is held by us as security for an indebtedness due by J. W. Beall," referring to the note of \$7,500.

This case will therefore be reversed, in order that the chancery court may require the complainant to give the respondent Geo. A. Folmar the benefit of said collateral by requiring it to exhaust the \$7,500 before collecting from him any part of the debt of Beall & Coston that is included in the amount claimed under the original bill. It appears that the notes also include the individual indebtedness of George A. Folmar, all of which has been

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paid except \$382.89, and we affirm the ruling of the chancellor upon the report of the register as to the credits claimed by George A. Folmar. The complainant being an existing creditor of George A. Folmar the grantor, the conveyances from him to his children were voluntary upon the face thereof and void as to them.—*Seals v. Robinson*, 75 Ala. 363; *Caldwell v. King*, 76 Ala. 149.

The respondents Lucy Hawkins and Felix Folmar say that the recited considerations were inserted in the deeds by mistake, that the true consideration is not disclosed, and they invoke the aid of the chancery court by cross-bill to have the conveyances reformed so as to make them recite the true consideration. In order to reform a contract which fails to express some important element thereof, it must appear that the parties mutually intended that it should have been so expressed, or that it is expressed differently from what they had mutually agreed it should express, and this failure or difference of expression is the result of mistake or fraud.—*Clark v. Hart*, 57 Ala. 390; 1 Story's Eq. Ju. 140, 152; 1 Brick. Dig. p. 68, §§ 606, 607, 608. "Another familiar principle is that courts of equity proceed with very great caution in reforming written instruments, and, if the mistake as alleged is not admitted, it must be proved by clear, exact, and satisfactory evidence, the presumption being that the contract as executed contains the conclusion of all previous negotiations on the subject and is the final agreement of all parties."—*Kilgore v. Redmill*, 121 Ala. 485, 25 South. 766. The chancellor was fully justified by the evidence in holding that the grantees under the conveyances from George A. Folmar were not entitled to a reformation of the deeds.

The chancellor erred in sustaining the demurrer to the cross-bill, and a decree is here rendered overruling said demurrer. The sale, having been made and confirmed, is hereby vacated, and the decree having included the Beall & Coston debt, without giving the respondents the benefit of the \$7,500 collateral note, is reversed in that particular, but is affirmed in so far as it affects the

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individual indebtedness of Geo. A. Folmar, and in holding the conveyance from him to the other respondents inoperative as against the claim of the complainants.

Affirmed in part, reversed and rendered in part, and remanded.

WEAKLEY, C. J., and HARALSON, SIMPSON, and DENSON, JJ., concur.

Thomas, *et al.*, v. Cowin.

Bill to Carve Out Dower.

(Decided Jan. 17, 1906. 39 So. Rep. 898.)

1. *Vendor and Purchaser; Effect of Vendor's Wrong; Bona Fide Purchasers.*—The fact that the owner of land plots and sells the same without having the survey of the plot recorded, as required by acts 1886-87, p. 93, does not affect the title of an innocent purchaser of one of the lots.
2. *Deeds; Description.*—A deed describing land so as it can be made certain by extrinsic evidence is not void for uncertainty of description.

APPEAL from Birmingham City Court.

Heard before HON. C. W. FERGUSON.

Bill by Cornelia Cowin against Kate Thomas and others. From a decree overruling a demurrer to the bill, defendant appeals. The facts sufficiently appear in the opinion of the court.

WEBB & AMASON, for appellant.—Demurrers 1, 2, 3, and 4 were improperly overruled as was the motion to dismiss for want of equity.—§ 1504, code 1896; 36 Ala. 533. The legal title to the land was in M. F. Carden and the lands not having been plotted as required by Acts 1886-87, p. 93. the deeds made by Carden and others to the lot were void.—*Joseph v. Decatur Land Co.*, 102 Ala.

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346; *Youngblood v. Trescott*, 95 Ala. 526. The penalty imposed by Sec. 7 of the Acts of 1886-7, p. 93, and continued by Acts 1888-9, p. 53, prevented any title from passing by the deeds under which complainant holds.—*Tillman v. Spann*, 68 Ala. 106; *Lindsey v. Veasey*, 62 Ala. 421.

SMITH & WILLIAMS, for appellee.—The deed will not be declared void for indefiniteness in description and parol evidence was admissible to render certain the description in the deed.—Devlin on Deeds, § 851; Tiedman on Real Property, § 827; *Clements v. Pierce*, 63 Ala. 292; *Sykes v. Shoals*, 74 Ala. 283; *Meyer v. Mitchell*, 75 Ala. 475; *Guilmartin v. Wood*, 76 Ala. 205; *O'Neal v. Seixas*, 85 Ala. 80; *Roman v. Stewart*, 103 Ala. 650; *Cunningham v. Hill*, 119 Ala. 353. The Acts of 1886-87 and 1888-9, have no application.—9 Cyc. p. 552. The purchaser and his grantee are entitled to enforce the contract as innocent parties and purchasers.—*Whetstone v. Bank*, 9 Ala. 884; *Brooklyn Life Insurance Co. v. Bledsoe*, 52 Ala. 532; *Hill v. Freeman*, 73 Ala. 200; *Thornhill v. O'Rear*, 108 Ala. 299; *Diefenbach v. Vaughn*, 116 Ala. 160; *Electric Light Co. v. Rust*, 117 Ala. 680; *Long v. G. P. Ry. Co.*, 91 Ala. 519.

DENSON, J.—The purpose of the bill in this case is to have a dower interest carved out of the real estate described and set apart to the widow, the complainant in the bill. The bill avers that the husband was seized in fee of the land described during the coverture, and that the complainant has never, by conveyance or otherwise, aliened or relinquished her right to dower in the same. The bill was demurred to, and motion made to dismiss the same for want of equity. Both the demurrer and the motion were overruled, and from this decree the present appeal is prosecuted.

The averments of the bill undoubtedly give it equity. The demurrer proceeds upon the theory that the bill shows that the lot out of which it is sought to carve the dower interest, and which was sold and conveyed to the husband of the complainant during his life, was a lot in

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a survey which had been surveyed and platted or mapped by the owner, but not in accordance with the provisions of the act of February 28, 1887 (Acts 1886-87, p. 93), and that, in violation of said act, which by section 7 (page 95) imposed a penalty on the owner of the land for such violation, the contract of sale was void, and consequently passed no title from the vendor to the vendee. The act in question did not declare the contract made in violation of its provisions void, but made it a misdemeanor for the owner of lands to survey and plat and sell in violation of the terms of the said act. It was never intended that it should operate as a snare for the innocent purchaser. The prohibition and the penalty are expressly directed against the owner of the land who violates the statute. On well-settled principles, when the statute makes the doing of an act a misdemeanor, the contract arising out of the act is not enforceable; "yet it is subject to this qualification: that, although the legislature may forbid the doing of a particular act, a party not a privy to it, or involved in the guilt of the transaction, may recover of the guilty actor, unless the act itself is void."—*Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Whetstone v. Br. Bank of Montgomery*, 9 Ala. 875.

In the case cited by counsel for appellants, the attempt was by the guilty actor to enforce a contract made in violation of the statute. So far as the record shows, Cowin, the husband of the complainant, was an innocent purchaser and vendee, and in no sense "involved in the guilt of the transaction." And the same may be said as to his immediate vendor, Houston. We feel no hesitancy in declaring that by the conveyance to Houston, and from Houston to Cowan, the legal title to the land in question passed to the latter. The deed is not void for uncertainty in description. It clearly falls within that class covered by the doctrine of "Id certum est quod certum reddi potest."

We find no error in the record, and the decree will be affirmed.

Affirmed.

HARALSON, DOWDELL, and SIMPSON, JJ., concur.

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Winkleman v. White, et al.*Bill for Review.*

(Decided July 6th, 1906. 42 So. Rep. 411.)

1. *Equity; Bill of Review; Presumptions; Record.*—The fact that the record was silent as to the filing of the bond as required by Section 759, Code 1896, before the sale, the defendant having been brought in by publication only, and the sale having taken place within twelve months after the decree, is no ground for reviewing the decree of foreclosure; the presumption being that the bond was given.
2. *Mortgages; Action for Foreclosure; Reference; Notice to Defendant.*—It is unnecessary to give notice of a reference to be held in a suit for the foreclosure of a mortgage to a defendant who is in default.
3. *Equity; Bill of Review; Scope of Review; Notice of Reference.*—The failure to give a defendant notice of a reference in a foreclosure suit is a mere irregularity, which cannot be taken advantage of by bill for review.
4. *Same; Form of Decree.*—The fact that the foreclosure decree omitted the direction that a copy of the same be sent to a defendant is not ground for reviewing the decree, on a bill for review.
5. *Same; Repugnancy of Bill.*—It is not a good objection, on a bill for review, that a bill for foreclosure of a mortgage or to enforce a vendor's lien was filed in a double aspect and that the relief in each would not be identical.
6. *Same; Pleading; Repugnancy.*—A bill is not repugnant that seeks to foreclose a mortgage, or in the alternative, to enforce a vendor's lien.
7. *Same; Bill of Review; Pleading; Presumption.*—A bill of review brought more than twelve months after the decree does not show error in rendering the decree of foreclosure, sought to be reviewed, because the bill in the foreclosure suit did not contain averment as to the residence of a husband who failed to join in his wife's mortgage; there being no presumption that the husband was a resident of this State, and that the mortgage was invalid under Section 2348, Code 1896, especially in view of the fact that the decree becomes absolute as to a defendant properly brought in after the lapse of twelve months, under Section 753, Code 1896.

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8. *Same; Allowance of Attorney's Fee.*—This court being unable to know the evidence on which the register based his report, or to review it if known, cannot say, on a bill for review, that there was error apparent in the allowance of a five hundred dollar attorney's fee for foreclosure of mortgage. A wrong conclusion drawn by the court from the evidence will not reverse the decree, on bill for review.
9. *Same; Signature to the Bill.*—The fact that the foot-note to the bill for foreclosure was not signed by counsel, being, as it was, an amendable defect, and a defect waived unless taken advantage of by demurrer, and it not appearing that demurrer was filed thereto, is not ground to review the decree of foreclosure, on bill for review.
10. *Mortgages; Actions for Foreclosure; Necessity for Cross Bill.*—In a foreclosure suit, filed by the holder of two of several notes, secured by a mortgage, affirmative relief may be granted to the holders of all the other notes, and the priority of liens declared, without a cross bill filed by the holders of the other note.

APPEAL from Birmingham City Court.

Heard before Hon. W. W. WILKERSON.

This was a bill filed by Maggie C. Winkleman against Frank S. White and others for review of a decree, the facts of which sufficiently appear in the opinion of the court.

JAMES E. WEBB, and LEADBEATTER & JOHNSON, for appellant.—The court erred in sustaining the demurrers on the following grounds: 1st. The decree sought to be reviewed was rendered upon a bill alleging inconsistent repugnant claims for relief and no decree pro confesso nor final decree could be rendered.—*City of Eufaula v. McNab*, 67 Ala. 588; *Heinz v. White*, 105 Ala. 670; *Moog v. Talcot*, 72 Ala. 210; *Micou v. Ashurst*, 55 Ala. 606; *Watts v. Eufaula National Bank*, 76 Ala. 474.

The court erred in the original decree here sought to be reviewed in granting the foreclosure of the mortgage executed by Mrs. Winkleman. Her husband did not join with her as required by Sec. 2348, code 1896.—*Davidson v. Cock*, 112 Ala. 510; *Johnson v. Goff*, 116 Ala. 648. Nor could relief be granted for a vendor's lien on account

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of the independent security taken on the notes.—*Kyle v. Bellinger*, 79 Ala. 516; *Ramage v. Towles* 85 Ala. 588; *Donegan v. Hentz*, 70 Ala. 437; *Woodall v. Kelly*, 85 Ala. 368; *Kinney v. Ensminger*, 94 Ala. 536; *Hammett v. Strickland*, 99 Ala. 616. The provision in the mortgage provided for attorney's fees only in case of foreclosure under power and the court improperly allowed attorney's fees for the foreclosure in chancery.—*Bynum v. Call*, 96 Ala. 200; *Lehman v. Comer*, 89 Ala. 579; *McCall v. Mortgage Co.*, 99 Ala. 427; *Pollard v. Mortgage Co.*, 120 Ala. 1. Aside from the mortgage, and in the absence of the vendor's lien, the original complainant is not entitled to attorney's fee for collecting the note. The notes of themselves could not have been collected in chancery, hence, the court erred in affirming the register's report allowing \$500.00 as attorney's fees in the decree sought to be reviewed.—*Tedder v. Steele*, 70 Ala. 347; *Kyle v. Bellinger*, *supra*; *Thompkins v. Drennen*, 95 Ala. 463. The court erred in its original decree in confirming the sale of appellant's lands made by the register without requiring bond under Sec. 759 of the code. Such sale is voidable and may be reviewed when made in defiance of the statute.—*Seely v. Smith*, 85 Ala. 25; *Ashford v. Patton*, 70 Ala. 179; *Dougal v. Dougherty*, 39 Ala. 409.

GEO. A. EVINS and H. C. SELHEIMER, for appellee.—In order to sustain a bill for review the error must affirmatively appear on the record.—*Tankersly v. Pettis*, 61 Ala. 356; *McDougal v. Dougherty*, 39 Ala. 409; *Noble v. Hal-lonquist*, 53 Ala. 233; *P. & M. Bank v. Dundas*, 10 Ala. 661; *McCall v. McCurdy*, 69 Ala. 71; *Jordan v. Hardie*, 31 So. Rep. 505.

The evidence is not part of the record which may be referred to to show error apparent.—*Jordan v. Hardy*, 31 So. Rep. 506; *McDougal v. Dougherty*, 39 Ala. 409. Every presumption must be indulged in favor of the correctness of the former judgment which is not repelled affirmatively by the record.—*George v. George*, 67 Ala. 196; *Goldby v. Goldby*, *Ib.* 564; *Jordan v. Hardy*, *supra*. Not only must the record show error but it must show

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that such error was injurious to the party complainant.—Authorities next above; *McCall v. McCurdy*, 69 Ala. 65; *Allgood v. Bank*, 29 So. Rep. 855. A mortgage given by a married woman for the purchase money of the land mortgaged, though it be invalid for some reason is in equity a valid security for the purchase money.—*Lammons v. Allen*, 88 Ala. 413. Prior to the act amending Sec. 2348, code 1896, a married woman could make a valid mortgage of her land.—*Hamil v. A. & F. Co.*, 127 Ala. 90. Where husband and wife are both non residents the husband need not join in the alienation.—*High v. Whitfield*, 30 So. Rep. 450. Coverture is no defense to a mortgage given to secure purchase money, and it is immaterial whether the decree foreclosed the mortgage or enforced the vendor's lien.—*Joseph v. Decatur Land Co.*, 102 Ala. 346; *Wadsworth v. Hodge*, 88 Ala. 503; *Strong v. Waddell*, 56 Ala. 472. On a bill for review it will be presumed that the bond was given to authorize a sale against the non-resident.—*Seelye v. Smith*, *supra*.

The failure to execute the bond provided for in Sec. 759 of the code is not ground for bill of review.—*Seelye v. Smith*, 85 Ala. 32; *Holly v. Bass*, 63 Ala. 387; *Saure v. Elyton Co.*, 73 Ala. 85. The sale in this case might have been decreed on the prayer of the defendantst, who made their answers cross-bills, even if the original bill had been dismissed.—*Abels v. Bank*, 92 Ala. 386. The original bill and cross-bill constitute one suit.—*Ayers v. Chicago*, 101 U. S. 187; *Ex parte R. R. Co.*, 95 U. S. 225; *Ayers v. Carver*, 17 How. 591.

Where several notes are secured by the same mortgage, and assigned at different times, the assignee of the note first assignd is entitled to be paid first.—*Knight v. Ray*, 71 Ala. 383; *Ala. Gold Ins. Co. v. Hall*, 58 Ala. 1; *Parsons v. Martin*, 86 Ala. 352.

TYSON, J.—This is a case of a bill of review filed by appellant in the city court of Birmingham to which a demurrer was sustained, and the appeal is to reverse the decree dismissing the bill.

The bill in the original suit was filed by F. S. White, in a double aspect, to foreclose a mortgage and enforce

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a vendor's lien, against the appellant and others. It was alleged that White held a mortgage on the land in question, made by one Fitts for about the sum of \$2,500; that Fitts sold the land to appellant for a consideration of \$40,000 which was paid, except as to \$15,000, and that to secure this six promissory notes were executed by appellant, maturing at different times, and that two of these notes, the last due, but the first assigned, were transferred to White by Fitts; and that in consideration of this he (White) marked "Satisfied" the original mortgage which Fitts had given him. The said six notes were secured by a mortgage made by the appellant, who is and was a married woman; but her husband, though signing the mortgage, did not otherwise join in the conveyance, his name not being mentioned in the body of the instrument. The notes and mortgage were executed on September 8, 1891. The bill was filed to foreclose the mortgage to satisfy the two notes transferred to White, and, that failing, to enforce the vendor's lien originally held by Fitts for the payment of the notes as representing that much of the purchase money to be paid for the land. The notes were signed by the appellant and her husband, and were duly assigned by Fitts, the payee. The notes contained a waiver of exemption and a stipulation to "pay all costs for collecting the above (debt), including reasonable attorney's fees, on failure to pay at maturity," and the mortgage provided that if default was made in paying the notes in whole or in part, the mortgagee, or her agents or assigns, after giving prescribed notice, were authorized to sell the property at auction for cash at the courthouse door, "and the proceeds to be devoted to the payment, first, the expense of advertising and selling and the payment of a reasonable attorney's fee for foreclosing this mortgage," etc. The appellant and her husband, and the holders of the other notes and the assignor of the notes and her husband, all of whom were nonresidents, were made parties defendant. The bill prayed for publication as to the defendants; that complainant's debt be ascertained; also the amount due the residents on the purchase-money notes held by

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them, "and that reference be had to ascertain the amount due complainant as solicitor's fees; that a vendor's lien be declared and established in favor of the holders of the above-described purchase-money notes for the amount due each of them, respectively, in said land"; that the priorities of the holders of notes be determined; that the makers be required to pay, and in default that the land be sold and the mortgage foreclosed; that complainant be declared to have a first lien, and that the holders of notes be allowed to purchase and satisfy their bid by the amount of the proceeds of sale to which they would be entitled on a sale for cash; and for general relief. The footnote of the bill was not signed by counsel.

A decree *pro confesso* was rendered against appellant and three other defendants, including her husband, on publication. The other three defendants, who were holders of notes secured by the mortgage sought to be foreclosed, answered, and sought to make their answers cross-bills; but they made no parties, and no proceedings whatever were taken thereon in the cause, except that as to complainant White and some others, including appellant, papers purporting to be appearances to the cross-bill were filed. The cause was submitted for final decree on the pleadings and evidence and decree *pro confesso* on the original bill against appellant and her husband and two other defendants on publication, and a decree was rendered holding that complainant was entitled to relief, and referring it to the register to report: (1) The amount of the complainant's debt, represented by two notes held by him, not to include solicitor's fees. (2) What would be a reasonable attorney's fee for collecting the notes sued on by foreclosing the mortgage. (3) The amounts due the other holders of notes. (4) What would be a reasonable attorney's fee for collecting the notes held by them on foreclosure of said mortgage. The register made a report in pursuance of the order, reporting \$4,687.40 of debt due complainant White and \$500 as an attorney's fee; \$2,895.37 of debt due Webber, one of the defendants; \$9,482 of debt due Robinson, as executor, another defendant; and \$4,585.57 as due Cook, another

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defendant. This report was made on December 10, 1898, was confirmed, and afterwards, on April 18, 1899, a final decree rendered, by which the complainant was given a priority of payment, and it was decreed that complainant was entitled to have the mortgage foreclosed and the property sold for the payment of all the notes secured by the mortgage; and thereupon the court found the complainant's debt, including the attorney's fee of \$500, to be \$5,187.40, with interest thereon from the date of the report (December 10, 1898), and also found due to defendant Webber \$2,895.37, with interest from date of report, making \$2,927.25, and the defendant Cook \$4,588.57, with interest, making \$4,627.84, and to defendant Robinson \$9,482.66, which, with interest, made \$9,585.82, as of the date of the decree, and thereupon further decreed that said several sums, with costs of suit, should be paid in 30 days, and that on default the property should be sold by the register. The register on June 13, 1899, reported a sale of the land to complainant White for \$5,530.75 as having been made on June 12th, the day preceding. On June 17th, five days thereafter, the sale was confirmed. The appellant did not appear in any of the proceedings on the original bill.

The difference between a bill of review and an appeal or writ of error is stated clearly in the case of *McCall v. McCurdy*, 69 Ala. 65. In the case of appeal or error "the whole record is drawn under consideration of the court, and advantage may be taken of all errors or irregularities which may have intervened in the course of the proceedings, if they have not been waived," including all such as might be urged on review. "The error of the decree in any respect, whether it be of law or fact, is open to inquiry and correction." And, if error is shown, there is presumption of injury, and to avoid a reversal it must clearly appear from the record that there is no injury:—*Deery v. Cray*, 5 Wall. (U. S.) '807, 18 L. Ed. 653; *Smith v. Shoemaker*, 17 Wall. 639, 21 L. Ed. 717. But in bill of review no mere irregularity, or impropriety, or wrong conclusion from the evidence, is available to reverse. "There must be error in substance, of prejudice

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to the party complaining, apparent on the face of the pleadings, proceedings, or decree." "Comparing the decree with the pleadings and other proceedings, it must be apparent that the court has reached and declared an erroneous conclusion of law as to the right of the parties. Whatever of other errors than this which have intervened, errors in the regularity of the proceedings, erroneous deductions from the evidence, must be corrected by writ of error or by appeal. It is not the office of a bill of review to enquire into and correct."—*McCall v. McCurday*, *supra*.

It is first insisted in this case that, the complainant being brought in by publication only, no sale should have taken place under 12 months without bond being given as required by section 759 of the code of 1896. The giving of a bond as a preliminary to the execution of the decree is a matter which occurs after the rendition of the decree, and the absence of any record notice of such bond would not be ground for reversal on bill of review. The presumption would be that a bond was given; and, if not given, the remedy would be such as is indicated in *Seelye v. Smith*, 85 Ala. 32, 4 South. 664; *Sayre v. Flyton Land Co.*, 73 Ala. 85, and *Holloy v. Bass' Adm'r*, 63 Ala. 387.

It is also urged that no notice was given to complainant of the reference. But, being in default, no notice was necessary, if none was given.—Rule 92 of Chancery Practice. And, besides, such matter would be a mere irregularity, which could not be reached on bill of review. Nor would the omission in the decree of a direction for a copy to be sent the appellant be ground of reversal on review, since it would not on appeal.—*Holly v. Bass' Adm'r*, 63 Ala. 387.

The objection that the bill was filed in two aspects, and that the relief in each would not be identical, is one going to the form of the bill, and would not be good on bill of review, when the question is as to error and injury in the relief granted. But we do not understand the law to be that in alternative aspects the relief must be the same in either, though there are some expressions to that

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effect in some of the cases.—*Micou v. Ashurst*, 55 Ala. 607. The true rule is that relief of the same general character must be allowable in each aspect. Here the relief is of the same character in each aspect, viz., to charge the same debt on the same land against the same parties, but by alternative rights—by the mortgage, if valid; by a vendor's lien, if invalid. There is no repugnancy in such a bill.—*Joseph v. Decatur Land Imp. & F. Co.*, 102 Ala. 346, 14 South. 739; *Romanoff Mining Co. v. Cameron*, 137 Ala. 214, 33 South. 864; *Dickerson v. Winslow*, 97 Ala. 451, 11 South. 918; *Tipton v. Wortham*, 93 Ala. 321, 9 South. 596; *Globe Iron Roofing Co. v. Thatcher*, 87 Ala. 458, 6 South. 366. If the bill was repugnant or multifarious, it would have been open to demurrer therefor, but not to impeachment on bill of review. Such objections go to the form and regularity of the proceeding, and do not necessarily affect the decree on the merits.—*McCall v. McCurdy*, *supra*.

It is insisted that the foreclosure of the mortgage and the allowance of an attorney's fee of \$500 is error apparent, because the husband did not join in the body of mortgage of the wife as a party, though signing and acknowledging it and signing the notes; that the bill in the former suit did not make any averment as to the residence of the husband at the time of the execution of the mortgage; and that it must be presumed that he was a resident of Alabama, and, therefore, that the mortgage was invalid under section 2348 of the code of 1886, which was then in force. This objection is founded upon the idea that this court, in reviewing a former cause for error apparent, must presume as to the residence of the parties, a fact, in order to establish error; that is, presume that the complainant's husband was at the date of the making of the mortgage a resident of the state. The residence of a party is a question of fact as to which the law indulges no presumption, except as a logical conclusion from other facts proved or admitted. It is not to be inferred as a fact in this case that the complainant's husband resided in Alabama, rather than elsewhere. If the point had been made as to the sufficiency of the mort-

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gage on the original trial, it might be that a demurrer would have been sustained for not alleging the nonresidence of the husband, or some other fact which would dispense with his joining in the instrument. If such objection had been made, of course, an amendment could have cured it. If now allowed, it would result in the reversal of a decree on review for a mere defect of form. If the law indulged in any presumption as to the domicile of the husband, it would rather be that he was a nonresident than resident, since the mortgage is executed and acknowledged in another state, and the husband was a nonresident pending the proceedings to foreclose.—1 Wigmore on Evidence, §§ 190, 382. Beyond this, it seems that the party, impeaching a former decree for error apparent, must not only show error, but that it was injurious. No matter what error there may be in a proceeding at law, a chancery court will never grant relief without a clear showing against the justice of the judgment.—*French v. Garner*, 7 Port. 549. The same rule holds in bills of review. The complainant must not only show error, but that it is injurious. "There must be error of substance, error in the conclusions of the court on matter of law affecting the rights of the parties, and it must be apparent that injury has resulted from the error."—*McCall v. McCurdy*, 69 Ala. 65; *Haig v. Homan*, 8 Clark & F. 320; *Tommey v. White*, 1 H. L. Cas. 164; *Whiting v. U. S. Bank*, 13 Pet. (U. S.) 6, 10 L. Ed. 33; *P. & M. Bank v. Dundas*, 10 Ala. 661.

In this case there is no averment that in fact the husband of complainant was a resident of the state. Nor is it apparent on the record of the former suit that the mortgage was not strictly legal and binding without the husband joining therein, as then required in case of residents of the state. As the question of residence of the husband was not raised in the original suit, or the decree attacked within 12 months, as was allowable in case of decrees without personal service, it must be assumed that all mere irregularities of procedure and all amendable errors are cured, and on a question of error on review it would be improper to indulge in a presumption of resi-

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dence in one state rather than another to reverse the decree. The contrary presumption would be indulged to sustain it. The law makes a decree absolute as to a defendant properly brought in after the lapse of 12 months, or after 6 months if served with a copy of the decree.—Code 1896, § 753. The lapse of this period, without objection duly made, relieves the case of all errors, except plain errors of law apparent on the record. The residence of the husband in this case, at the date of the execution of the mortgage is not apparent, and therefore it cannot be concluded that the mortgage was not properly executed and binding.

And though the attorney's fee allowed in the case might not properly be based on the terms of the mortgage itself, since it may be said it allowed such fee only for exercising the power of sale en pais, the notes contained a provision for the payment of all costs of collection, "including a reasonable attorney's fees, on failure to pay at maturity," and the direction to the register was to report "what would be a reasonable attorney's fee for collecting said notes (those held by the complainant) by foreclosing the mortgage securing said notes," and the report conformed to this direction. We are unable, in a case of this kind, to know the evidence on which the register founded his report, or to review it, if known. A mere wrong conclusion drawn by the court from the evidence cannot be reversed on a bill of review. We are therefore unable to say that there was error apparent in the allowance of the attorney's fee of \$500.

The point taken in argument that the footnote to the original bill was not signed by counsel is entirely one relating to form, easily amended, and exposing the bill at most to a demurrer. And, there being no such objection, the error is considered as waived even on appeal.—*Alabama Warehouse Co. v. Jones*, 62 Ala. 550. And on bill of review such objections are never available, nor is this error assigned in the bill of review.—*McCall v. McCurdy*, *supra*; Story's Eq. Plead. § 411; 2 Dan. Ch. Prac. 1576.

It is finally urged that it was error apparent and of substance in decreeing affirmative relief to defendants to

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the bill without a cross-bill. It is generally said that a defendant is entitled to no affirmative relief without a cross-bill.—*Bedell v. N. E. M. L. Co.*, 91 Ala. 325; *Cullum v. Ewin*, 4 Ala. 452. In *Gillam Sons & Co. v. N. O. & S. R. Co.*, 72 Ala. 566, a bill was filed by a judgment creditor, with a return of "No property found" on execution against an insolvent corporation, amongst other things, to set aside a mortgage and to have the mortgage bonds declared inferior liens to the judgment. Two cross-bills were filed, bringing the whole matter of litigation before the court, and under the first of which all the bondholders could obtain relief. The court dismissed the second cross-bill, the one filed by appellants, on the ground that one cross-bill was sufficient to bring before the court the whole matter of the rights of the parties. And the court said: "A cross-bill is not entertained when in the original suit the party filing it can obtain the full relief to which he is entitled." In that case the original bill was a judgment creditor, attacking all the bonds, and therefore a cross-bill was necessary for the bondholders to obtain relief beyond defeating the plaintiff.—2 Dan. Ch. Pr. 1550; *Watts v. Eufaula N. Bank*, 76 Ala. 474. But the court in the *Case of Gilman, supra*, entertained only one cross-bill by one of the bondholders, and decreed between the defendants to the cross-bill. On appeal, the court held that Gilman Sons & Co., defendant to the cross-bill, were entitled to priority of payment. This case settles that, if the original bill had been filed by a holder of the secured bonds, full relief could have been given to all the holders of such bonds against the plaintiff and against each other; that is, that the amounts due to each and their priorities could be determined, and the property sold to pay the same, since the court dismissed the appellant's cross-bill as unnecessary after one cross-bill has been filed. The cross-bill in that case was not necessary as a defense to the original bill, because the complainant could be fully met by the answer, and the cross-bill was sustained and decreed on as in the nature of an original bill after the original bill itself had been dismissed. In this case the original bill

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stands entirely as the cross-bill of the Morton Bliss Company, in the case in 72 Ala., supra, stood, as a bill by one bondholder to foreclose the lien and adjust the rights of the several bondholders. And as one cross-bill may suffice to bring the whole matter of such cross-bill before the court, and enable the court to decree in favor of each defendant to such cross-bill, so an original bill, bringing the identical matter before the court, as in the case of one holder of bonds or notes secured by a mortgage, will enable the court to decree between defendants.—2 Dan. Chan. Pr. 1370, and note 6; Id. 1550; 16 Cyc. 326-328. The principle seems to be this: When the original bill or a cross-bill brings the whole subject before the court, any further bill will be dismissed as unnecessary. But, nevertheless, should any special case arise requiring a further bill, the court will direct one to be filed. The necessity of such rule is obvious. There might be 1,000 notes held by different persons and entitled to priority in the inverse order of assignment; and, if the lien could not be enforced by one bill or cross-bill, as the case may be, there would have to be 1,000 cross-bills, each with 999 defendants, which sufficiently shows that there is no such rule as that there may not be decrees between defendants on an original bill. The rule as expressed by Lord Eldon is that “where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so.”—2 Dan. Ch. Pr. 1370, note 6.—Lord Redesdale says the same in *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 718.—*Vandever v. Holcomb*, 17 N. J. Eq. 87; *Elliot v. Poll*, 1 Paige (N. Y.) 263; *Shannon v. Marselis*, 1 N. J. Eq. 424.

The complainant was the holder of two of a number of notes secured by the same mortgage, and it was necessary in order to give him complete relief, to determine the entire debt, and the order of priority. This relief could be given as to all the parties on the bill and answers; for the original bill brought the entire subject under control of the court. The other holders of notes appeared

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and insisted on the adjustment of their debts and priorities, and they took no appeal and are not now complaining. As between each of these holders of notes and the complainant in the original suit, the question of the amount and priority of the debts against the property was directly involved, and the mortgagor was liable for the aggregate. In such case, says Lord Redesdale, "the court is bound to decree between the defendants, and, refusing to do so, it would be a good cause of appeal by either defendant."—*Chambley v. Lord Dunsaney, supra*. The original bill brought under the control of the court the entire subject-matter of the ascertainment of all the claims against the mortgaged property and of a sale for their payment. There was thus no need for any cross-bill.—Rule 108 of Chancery Practice; *Gilman Sons & Co. v. N. O. & S. R. Co., supra*; *Soles v. Sheppard*, 99 Ill. 616.

We are constrained to hold that it is not shown that there is any substantial error apparent in the proceedings of the former suit injurious to the appellant.

The decree of the lower court is affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Prickett v. Prickett.

Bill to Enforce Resulting Trust and for Alimony.

(Decided June 30th, 1906. 42 So. Rep. 408.)

1. *Equity; Pleading; Bill; Multifariousness.*—A bill is multifarious and subject to demurrer, as such, that seeks to enforce a resulting trust in land, and, on independent averment, to have alimony decreed.
2. *Same; Venue; Mode of Objection; Demurrer.*—Where the bill affirmatively shows that the respondent is sued out of the county of his residence, the objection may be raised by demurrer.
3. *Same; Dismissal of Bill; Residence of Parties; Amendment.*—

Where the bill was originally to have a resulting trust declared in land, and to have alimony decreed, and it was filed in the county where the land was situated, and it was afterwards amended by eliminating the averment seeking to enforce the resulting trust, it was properly dismissed because not filed in the county where respondent resided.

APPEAL from Clay Chancery Court.

Heard before HON. W. W. WHITESIDE.

This is a bill to declare a resulting trust in land and for alimony pending an application for divorce. The facts are stated in the opinion of the court.

L. A. SANDERSON, for appellant.—The bill is not multifarious.—*Wilkerson v. Bradley*, 54 Ala. 677; *Andrews v. Jones*, 68 Ala. 117; *Stone v. Knickerbocker*, 52 Ala. 589. The object of the bill is single.—*Randle v. Byrd*, 73 Ala. 282; *Bolman v. Lehman*, 74 Ala. 507; *Carpenter and wife v. Hall*, 18 Ala. 439. The court had jurisdiction to grant the relief prayed.—*Driver v. Fortune*, 5 Port. 9; *Shelby's Case*, 84 Ala. 327; *Munford v. Pierce*, 70 Ala. 452.

KNOX, DIXON & BURR, for appellee.—The bill is multifarious and the demurrers are properly sustained.—16 Cyc. 241; *Heinz v. White*, 105 Ala. 673. The court had no jurisdiction of the defendant so as to render a personal decree for alimony against him.—*Campbell v. Crawford*, 63 Ala. 392; *Murray v. Murray*, 84 Ala. 365.

DOWDELL, J.—The bill in this case, as originally filed, sought to enforce a resulting trust in land, and at the same time on independent averments sought to have alimony decreed to complainant out of the estate of the respondent, the husband of complainant. These were distinct and separate subjects, and in no way connected, the one with the other. The relief prayed for is likewise separate and distinct. The bill, therefore, was demurrable for multifariousness.—16 Cyc. p. 241; *Heinz v. White*, 105 Ala. 670, 673, 17 South. 185.

The bill was demurred to as multifarious, and this demurrer was confessed. The bill was then amended, but the amendment in no wise relieved the bill of this objec-

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tionable feature, since both subjects were retained, and the prayer of the bill was unchanged. A demurrer to the bill as amended was then interposed, and sustained on the ground of multifariousness. The bill was then again amended to conform to the ruling on demurrer. The bill, as last amended, became one simply and alone by the wife for support and maintenance from the husband. The bill was brought in the chancery court of Clay county, and it affirmatively appeared in the bill that the respondent was a resident of Talladega county. Objection to the bill on this ground was raised by motion to dismiss, by demurrer, and by plea. The chancellor dismissed the bill, and this appeal is prosecuted from the decree dismissing the bill.

Where it affirmatively appears on the face of the bill that the respondent is sued out of the county of his residence, a demurrer is sufficient to raise the objection.—*Campbell v. Crawford*, 63 Ala. 392. As long as real estate remained as one of the subject-matters of the bill, the bill having been filed in the county where the land was situated, no objection could be taken to the bill on the ground that it was not filed in the county of the respondent's residence. Under the statute, when real estate is the subject-matter of the suit, "whether it be the exclusive subject-matter of the suit or not," the bill may be filed in the district where the same, or a material portion thereof, is situate.—§76, code 1896. The defendant, therefore, could not raise the question of jurisdiction until after the bill had been amended eliminating the real estate as a subject-matter of the suit. The chancellor properly dismissed the bill, and the decree will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

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Rike, et al. v. Ryan, et al.

Bill by Creditors to Set Aside and Declare Fraudulent Certain Sales and a Mortgage.

(Decided June 30, 1906. 41 So. Rep. 959.)

1. *Fraudulent Conveyances; Actual Fraud; Burden of Proof.*—In order to set aside a mortgage, made before complainants' debts were created, for fraud, the burden is on complainants to show actual fraudulent intent participated in by both mortgagor and mortgagee.
2. *Chattel Mortgages; Retention of Possession.*—The fact that the mortgagor retains possession of the mortgaged chattels, or that the mortgage contains a provision authorizing the same, is not such a reservation of a benefit as will invalidate the conveyance as to existing or subsequent creditors of the mortgagor.
3. *Same; Failure to Record.*—The failure to record a chattel mortgage, unless purposely withheld for concealment or to give the mortgagor false credit, can have no other effect than to postpone its lien to after required liens.
4. *Fraudulent Conveyances; Preferences.*—If the debt be bona fide, the payment absolute, and the property conveyed does not materially exceed in value the amount of the debt, a debtor may prefer his creditors.
5. *Same; Evidence.*—A mortgage given in good faith to secure money loaned from time to time, and at a time when the mortgagee had no reason to believe that the mortgagor was embarrassed, and while the mortgagor's credit was still good, is not fraudulent.
6. *Same; Exempt Property.*—A conveyance of personal property of less value than the statutory exemption by a debtor, is not subject to attack by creditors.

APPEAL from Morgan Chancery Court.

Heard before HON. W. T. SIMPSON.

This was a bill filed by numerous creditors seeking to have set aside and annulled as a fraud on creditors certain mortgages and sales made by Rike to the other parties named as respondents, and for receiver to take

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charge of the property. The accounts alleged to be due were variously made between the dates of Oct. 6, 1901, and March 24, 1902. The bill alleges the execution by Rike to Gunn of a mortgage dated May 19, 1902, for \$790 on certain property described therein, and also alleges that the indebtedness was fictitious, and that it was without consideration, and was executed to hinder, delay, and defraud creditors. That on February 28, 1902, the said Rike, being heavily embarrassed, sold and conveyed to one John Patgens a half interest in Rike's saloon business, stock, trade, and fixtures; that this sale was wholly without consideration, and that Falk claims the mortgage on an undivided half interest in a steamboat; that the date and amount of said mortgage complainants are unable to give. It further alleges that Falk has taken no control or management of said steamer. The other facts sufficiently appear in the opinion.

WERT & WERT, C. C. HARRIS and JOHN C. EYSTER, for appellant.—The consideration being shown the burden of proof of fraud lies on the creditor.—*Hodges v. Coleman*, 76 Ala. 103. To render a sale of property fraudulent it must be shown that the debtor had a fraudulent intent and that in such intent the purchaser participated.—*Shealy v. Edwards*, 75 Ala. 411. If an insolvent debtor gets a reasonable value for the property he may sell the same in the payment of an antecedent debt to the exclusion of his other creditors.—*Lery v. Williams*, 79 Ala. 171; *Beddow v. Shepperd*, 118 Ala. 474; *Morris v. Campbell*, *Ib.* 333; *Bates v. Vandiver*, 102 Ala. 249. If a mortgage is given and taken in good faith to secure a bona fide debt the fact that it may hinder or delay creditors does not render it void.—99 Ala. 119; 113 Ala. 652. The conveyance of exempt property is not fraudulent and void as to creditors.—107 Ala. 170; *Pollock v. McNeill*, 100 Ala. 203.

A. J. HARRIS and E. W. GODBY, for appellee.—No brief came to the reporter.

SIMPSON, J.—This was a bill filed by the appellees, who are creditors of the appellant Rike, to set aside and

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declare fraudulent certain sales and mortgages of personal property made by said Rike at different times to the other appellants severally.

Each transaction then necessarily stands on its own basis, and must stand or fall alone. It will be noticed that the mortgage made to Falk was made before any of the debts were created, so that, in order to set aside that mortgage as fraudulent, the burden rests upon the complainant to show an actual fraudulent intent participated in by both mortgagor and mortgagee.—3 Mayfield's Dig. p. 875, No. 36; 5 Mayfield's Dig. p. 476, No. 13. The cases of *McDermott v. Eborn*, 90 Ala. 258, 7 South. 751, and *Christian & Craft Grocery Co. v. Michael & Lyons*, 121 Ala. 84, 25 South. 571, 77 Am. St. Rep. 30, rest upon the familiar principle that a mortgage of goods which are to be retained and used up by the mortgagor, such as a stock of goods, or lumber which he is constantly selling, is fraudulent per se. On the other hand, the very essence of a mortgage of ordinary property, is that the property remains in the possession of the mortgagor until the mortgage is foreclosed by the mortgagee. In the case of *Howell v. Carden*, 99 Ala. 111, 10 South. 645, the court says: "The mere retention of possession by the mortgagor, or a provision in the mortgage to that effect, is not such a reservation of a benefit to him as invalidates the instrument against his existing or subsequent creditors."—*Upson v. Raiford*, 29 Ala. 188. And while in that case the mortgage was recorded, in another case this court has held that unless the mortgage is purposely withheld for the purpose of concealment, and to give the mortgagor a false credit, the only effect of it would be to postpone it to after acquired liens.—*Lehman Durr Co. v. Van Winkle & Co.*, 92 Ala. 443, 450, 8 South. 870. There is no proof in the record to show any such fraud as the law requires to set aside this mortgage.

"To authorize a conveyance or sale made by a debtor to be pronounced fraudulent, two things must concur. The transaction must be shown to be infected with a fraudulent intent on the part of the grantor, and this must be participated in by the grantee."—*Shealy & Finn*

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v. Edwards, 75 Ala. 411, 416; *Howell v. Carden*, *supra*; 3 Mayfield's Dig. pp. 876-7, No. 42. A debtor may prefer his creditors if the debt be bona fide, the payment absolute, and the property not materially in excess of the debt.—3 Mayfield's Dig. p. 874, No. 34. "The rule is that when the payment of a valuable consideration is shown, the burden is cast upon the complaining creditor to prove the existence of a fraudulent intent, and that such intent was known to the grantee of the conveyance assailed."—*Allen v. Riddle*, 141 Ala. 621, 626, 37 South. 680; *Morrow v. Campbell*, 118 Ala. 330, 340, 24 South. 852.

Referring to the mortgage of Rike to Gunn (May 19, 1902) the testimony of Gunn shows that he had loaned various sums to the defendant Rike, from time to time; that Rike was running a saloon, also operating a steamboat and barges; that the debt was finally secured by the mortgage in good faith; that he did not know and had no reason to believe that Rike was embarrassed, and there is no proof to contradict this, or even to show that Rike was embarrassed at that time. On the contrary, his credit seems to have been good at that time, as the complainants were selling him goods on credit about that time. Under the authorities above cited the court erred in declaring this mortgage fraudulent.

With regard to the saloon fixtures, the testimony of Falk is clear that he bought them and placed them in the store which he rented to Rike; that Rike agreed to pay him \$5 per month as rent for the fixtures and did pay said rent, and that he told him that whenever he wished to buy them he could do so for \$225. The receipts are produced and identified corroborating his statement, and it is further shown that when Rike sold out his business the fixtures remained, and his successor paid the same rent. The discrepancies in Rike's testimony are not sufficient to overturn Falk's testimony. Rike testified that he was first in partnership with Patjens, then sold him the "white side" of the saloon, and these fixtures went to him. Patjens corroborates Rike about purchasing the "white side" of the saloon with the fix-

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tures, and he was to pay Falk the \$225 and have the fixtures.

In addition to all this, we think the evidence shows that the fixtures belonged to Falk, and all the other property did not amount to the \$1,000, which Rike had a right to claim and did claim under the exemption laws.

The decree of the court is reversed, and a decree will be here rendered dismissing the bill.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

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Bill for an Accounting and Injunction.

(Decided Feb. 17, 1906. 40 So. Rep. 311.)

1. *Accounting; Equity; Jurisdiction.*—Equity has no jurisdiction to entertain a bill for an accounting upon an allegation that it is difficult to ascertain the amounts due without an accounting, it not being alleged that the accounts are mutual and complicated.
2. *Discovery; Equity; Jurisdiction.*—Equity has no jurisdiction to entertain a bill for discovery, unless it is alleged that the one seeking discovery cannot prove the facts without the answer of the defendant.

APPEAL from Walker Chancery Court.

Heard before HON. A. H. BENNERS.

This was a bill filed in the chancery court of Walker county by Walker county in its corporate capacity and through its proper officers against John B. Hulsey, and prays that a receiver be appointed to take charge of and superintend the county's poorhouse; that said John B. Hulsey be enjoined from further exercising acts of superintendence or control over said poorhouse or its property or inmates; that an account be stated between complainant and Hulsey, and said Hulsey be required to pay for timber cut and used by Hulsey belonging to complainant, and for the goods and merchandise bought by

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Hulsey and used for his own benefit, which was charged to and paid by complainant. The case made by the allegations of the bill is that the county commissioners purchased for the county a certain tract of land, put improvements on it, cleared and fenced it, and established it as a county poor farm, and placed such indigent persons there as had a right to be there, elected Hulsey superintendent, and placed him in charge of the poor farm; that Hulsey in dereliction of his duty cut timeber from said lands and sold it for his own benefit, bought goods for himself and family, and had them charged to Walker county; and that the same had been paid out of the treasury of the county. The bill also alleges flagrant disregard of duty by Hulsey as such superintendent. It is further alleged that at a regular term of the commissioners' court Hulsey was removed as superintendent, and one Snoddy, a fit and suitable person for such place, was elected superintendent to fill Hulsey's place; that proper notice in writing and verbally was given said Hulsey of his removal, and demand made on him for an accounting for the timber cut and goods purchased for his own use, and a refusal on his part either to make an accounting or to surrender possession of the property and other things belonging to plaintiff. The bill also alleges the insolvency of Hulsey and his inability to respond in damages at law. There was motion by respondent to dismiss the bill for want of equity and to dissolve injunction. A number of demurrers were filed to the bill which are not necessary to set out. The court overruled the motion to dismiss and the demurrers, and from this action an appeal is taken.

RAY, LEITH & SHEPERD, and JNO. COLEMAN, for appellant.—The term waste is not predicated of the destruction of personal property but of real estate and the test is, is it a lasting damage to the freehold or inheritance. Waste cannot be charged in general terms, but some fact must be stated showing what constitutes it.—*Henry v. Watson*. 90 Ala. 336; *Clark v. Zeigler*, 79 Ala. 351; *Sims v. Grier*, 83 Ala. 265. The allegations of the bill are not sufficient to give the court jurisdiction either for an accounting or for discovery.—93 Ala. 544; 102 Ala. 192; 54 Ala. 475; 115 Ala. 543; 34 Ala. 643.

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LACY & LACY and W. C. DAVIS, for appellee.—The suit is properly brought in the name of Walker county.—119 Ala. 36. It is not necessary to allege authority to bring the suit.—91 Ala. 240; 5 Ency. P. & P. 300-301. The averments of the bill sufficiently show material complications of the accounts between the appellant and appellee.—138 Ala. 644; 96 Ala. 299. The motion striking parts of the answer cannot be reviewed on this appeal.—Sec. 427, Code 1896; 135 Ala. 497.

ANDERSON, J.—Mr. Pomeroy, in his excellent work on Equity Jurisprudence (3d Ed.) vol. 4, § 1421, says: "The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are where there are mutual accounts between the plaintiff and the defendant (that is, where each of the two parties has received and paid an account of the other); where the accounts are all on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law; where a fiduciary relation exists between the parties and the duty rests upon the defendant to render an account." These principles are in complete harmony with the previous decisions of this court.—*Pollak v. Claflin*, 138 Ala. 644, 35 South. 645; *Beggs v. Edison*, 96 Ala. 298, 11 South. 381, 38 Am. St. Rep. 94; *Avery v. Ware*, 58 Ala. 475; *Knotts v. Tarrer*, 8 Ala. 743; *State v. Bradshaw's Adm'r*. 60 Ala. 239.

The bill in the case at bar does not show mutual accounts, as it consists of certain claims against the defendant, and admits an offset, or credit, of \$64.—*Crothers v. Lee*, 29 Ala. 337; 21 Am. & Eng. Ency. of Law, p. 244. Nor is the account so complicated that the respondent's liability cannot be expediently ascertained in a court of law.—*Tecumseh Co. v. Camp*, 93 Ala. 572, 9 South. 343.

As to the existence or result of a fiduciary relationship between the parties, the respondent does not belong to that class of trustees, such as administrators, guardians, etc., over whom equity entertains a general jurisdiction, and it is unnecessary for us to decide whether or not his position was such as to preclude him from the general

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requirements for an accounting, since, if he did occupy such a position, the complainant would have no right to an equitable accounting, in the absence of mutuality and complications, when the matters for which an accounting is sought are peculiarly within the knowledge of the respondent. And the bill does not seek a discovery, or aver that the facts cannot be proved without the answer of the respondent. It avers that it is difficult to ascertain the amounts due without an accounting; but that is not sufficient. "The jurisdiction of the chancery court cannot be maintained upon the ground of discovery alone, unless it is averred in the bill that complainant is unable to prove the facts without the answer of the defendant." —*Crothers' Case*, *supra*; *Perrine v. Carlisle*, 19 Ala. 690.

The bill as amended was without equity, and the chancellor erred in not sustaining the motion to dismiss, and the decree is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

HABALSON, DOWDELL, and SIMPSON, JJ., concur.

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Bill to Remove Administration into Chancery Court.

(Decided June 20th, 1906. 41 So. Rep. 1010.)

1. *Equity; Jurisdiction; Administration of Estate; Transfer in Equity.*—Without assigning any special reason for transferring an estate to the chancery court, any person entitled to share in the distribution of an estate is entitled to have the administration removed from the probate to the chancery court.
2. *Same; Rights of Remaindermen.*—The fact that the remainder man alleged in his bill, for a removal of the estate from the probate to the chancery court, that the defendant, as administrator, had invested a part of the property bequeathed by the will in other property, and had taken the title thereto

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in his own name absolutely in disregard of his revisionary rights, will not deny him the relief sought, because the will devised and bequeathed the property to the administrator defendant for his life.

3. *Same; Pleading; Demurrer to Bill.*—If the complainant was entitled to any relief under the bill, a demurrer addressed to the bill as a whole was properly overruled.

APPEAL from Lauderdale Chancery Court.

Heard before Hon. W. H. SIMPSON.

This was a bill filed by appellee seeking to remove the administration of the estate of Kate Bresler from the probate to the chancery court. Complainant alleges that she is a daughter of Kate Bresler, formerly Kate Jacobs; that her mother is dead, leaving certain real estate and personal property to appellant during his lifetime with the reversion to complainant at appellant's death, that after the marriage of complainant's mother to appellant she intrusted a large amount of funds to the care and custody of appellant in the manner and for the purposes stated in the written instrument made in the handwriting of complainant's mother, and attached as Exhibit A to the bill of complaint. A copy of the will is also attached. The bill also alleges that complainant's mother left a will, by the terms of which appellant was appointed guardian of complainant and executor of the will without bond, and that the will had been probated and letters testamentary had been issued to appellant. That appellant had not filed an inventory of the goods, chattels, money, books, papers, and evidences of debt belonging to the estate of complainant's mother, and that appellant has made no settlement with complainant, and has filed no accounts and vouchers for a settlement of his trust. It is also alleged that the defendant has invested a part of the funds, about \$3,000, intrusted to him by complainant's mother in a part of lot 125 in the city of Florence, Ala., and has wrongfully taken the conveyance to said property in his own name, and that defendant has invested another part of the funds in lot 69 in the city of Florence, and has wrongfully taken the title to said lot in his own name. The prayer was for a removal of the administration into the

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chancery court, an order requiring appellant to file an inventory of all the property left by complainant's mother; the statement of an account showing the money belonging to the state and intrusted to appellant, and by him invested in property in his own name, and an order decreeing that complainant has a resulting trust in the lots above mentioned, and to declare a lien thereon for the purpose of securing her reversionary interest in the funds so invested, and for other further and general relief. Attached to the bill are interrogatories to be answered by defendant. Exhibit A to the bill is in the following language: "Being of sound mind, I here state what I have trusted to my husband, and it belongs to my child Frankie Jacobs (now Bloom). I first gave him \$100, next \$1,000, next \$1,250 for house occupied by Mrs. Hooks, then gave him \$600 I got from Cohen, and \$1,000 from Mrs. McFarland, \$400 from Patterson at Pineapple, \$400 from Elred, and \$170 from Joe Herz, the \$208 for two years' interest from bonds of United States and Mr. Cohen owes me \$756 on house. This is all my daughter's money earned by her own father and myself and if anything should happen to me, I wish some one would be kind enough to attend to this, and see my darling girl gets her property, besides he has had all the interest." A copy of the will was also attached, leaving to respondent for the term of his natural life all real estate and personal property except some personal property left to complainant, all of said real and personal property to revert to complainant at the death of respondent. Demurrers were interposed to the bill: (1) Complainant has plain and adequate remedy at law. (2) The bill shows that Kate Bresler gave all her personal property and real estate, including the personal property claimed to have been delivered to defendant in trust to defendant for the term of his life. (3) The will shows on its face that the money claimed to have been trusted to defendant for the use and benefit of complainant to have been given and bequeathed to defendant for and during the term of his life. (4) The bill does not show that defendant had any notice or knowledge of the letter made Exhibit A to the bill. (5) The bill shows on its

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face that the moneys sought to be recovered, or for which a resulting trust is claimed, were given and bequeathed to defendant for and during his natural life. The court overruled these demurrers, and from this decree this appeal is prosecuted.

EMMETT O'NEAL, for appellant.—The court provides the only way a will can be revoked.—Sec. 4261, Code 1896. The averments of the bill are always taken most strongly against the pleader.—*Lewis v. Mohr*, 97 Ala. 266; 16 Ala. 423; 30 Ala. 352.

J. T. ASHCRAFT and W. H. MITCHELL, for appellee.—The first grounds of demurrer were properly overruled.—*Ligon v. Ligon*, 105 Ala. 460; *Harland v. Pearson*, 93 Ala. 273; *Carey v. Simmons*, 87 Ala. 524. The second third, and sixth grounds of demurrer were properly overruled.—6 Ala. 463; 18 Ala. 771; 17 Ala. 270; 16 Cyc. 641. The fourth and fifth grounds were properly overruled.

DENSON, J.—Any person entitled to share in the distribution of an estate has the right to have the estate administered in a court of equity without assigning any special equity for transferring the estate to such court.—*Bromberg v. Bates*, 98 Ala. 621, 13 South. 557; *Id.*, 112 Ala. 363, 20 South. 786; *Ligon v. Ligon*, 105 Ala. 464, 17 South. 89; *Baker v. Mitchell*, 109 Ala. 490, 20 South. 40; *Greenhood v. Greenhood*, (Ala.) 39 South. 299. It seems that the statement of this proposition should be a sufficient answer to the first ground of the demurrer to the bill. The fact that the will devises and bequeaths the property to the defendant during his life presents no obstacle to the assumption by a court of equity of the administration of the estate; especially is this so, when the bill is filed by the remainderman, and it is averred in the bill that the defendant has invested a part of the property bequeathed by the will in other property, and has taken the title in his own name absolutely, and in disregard of complainant's reversionary rights, thus making it easy and possible for defendant to dispose of

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the property to innocent third parties, and finally deprive the complainant of her rights under the will.—*Bethea v. Bethea*, 116 Ala. 265, 22 South. 561.

The fifth ground of demurrer is a misconception of the purpose of the bill. But we would not be understood as holding that the complainant is entitled to relief that would deprive the defendant of the use of property devised or bequeathed him during his life. The averments of the bill nor the demurrers call for a construction of the exhibit to the bill marked "A." Nor is it necessary to determine the effect of the will with respect to Exhibit A. It may be said of all the grounds of the demurrer that they are addressed to the bill as a whole, and if the complainant is entitled to any relief at all, the demurrer is properly overruled.—*George v. Railroad Co.*, 101 Ala. 607, 14 South. 752. That the complainant is entitled to have the administration of the estate removed to the chancery court seems to be clear.

The decree overruling the demurrer must be affirmed. Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

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Petition to Decline to Give Effect to Discharge of Attorneys, and for Mandamus.

(Decided June 14, 1906. 41 So. Rep. 902.)

1. *Appeal; Attorneys; Dismissal; Fees.*—The petitioners seek to prevent their discharge as attorneys unless compensation for services rendered is paid or secured, and ask a reference to ascertain what such services are reasonably worth. Held, That an appeal will not lie from an order dismissing the petition.
2. *Attorney and Client; Discharge; Fees.*—Subject to the attorney's lien upon the fund brought into court through his efforts, or

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upon a money judgment, obtained by his services, a client may dispense with the services of an attorney.

3. *Same; Property to which Lien Attaches.*—The lien of an attorney for services rendered does not attach to lands or other things, but only to money judgments.
4. *Appeal; Discharge of Attorney; Discretion.*—It is within the discretion of the trial court to give effect or not to the discharge of an attorney, in a cause pending before it, and its action will not be reviewed on appeal, unless it clearly appears that such discretion was abused.
5. *Mandamus; Scope of Remedy; Adequate Remedy at Law.*—Mandamus will not lie to enforce a legal right, unless the right is clear and there is no other adequate remedy.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

This is a petition on behalf of Kelly & Middleton, the purposes of which are sufficiently set out in the opinion of the court. From a decree dismissing the petition this appeal was prosecuted. Motion was also made for a rule nisi to the Chancellor to show cause whether he should be restrained from discharging attorneys, etc., the substance of which appears in the opinion.

KELLY & MIDDLETON, for appellant, and movant.—The client has the unqualified right to change his attorney at will, whether from motives of caprice or otherwise, subject to the exception that leave of the court which is essential to give effect to the discharge will not be granted until the discharged attorney shall have been paid his compensation for services already rendered or the same secured to him.—4 A. & E. Ency. of Law, p. 409 and cases cited; 5 Century Dig. p. 113.

PEYTON H. MOORE, for appellee. No brief came to the Reporter.

TYSON, J.—This is a petition addressed to the chancellor asking a reference to ascertain the compensation reasonably earned by petitioners, as attorneys, for services rendered respondent in a chancery suit, and for a decretal order declining to give effect to petitioners' dis-

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charge until their compensation for services has been paid or secured, or until further orders from the court. The case made by the allegation of the petition is that petitioners were employed by respondent to represent him in a suit pending in the chancery court of Jefferson county wherein one Cole was complainant and this appellee respondent; that pending said employment they rendered valuable services to respondent in advance and the preparation of his defense; that petitioners have been notified that their services were no longer required by respondent in conducting his defense; and that petitioners have not been paid anything for services rendered, nor have they been tendered any payment or securities for the same. On motion of respondent the petition was dismissed for want of equity.

The cause is submitted upon the record and upon a motion for a rule nisi to the chancellor for a mandamus, or other remedial writ, commanding him to show cause why he should not be required to decline to give effect to the discharge of the petitioners as solicitors for respondent until respondent shall have first either paid or secured the said petitioners a reasonable compensation for services they have already rendered him. As an appeal will not lie from the order dismissing the petition, the record is considered for the sole purpose of ascertaining whether the rule should issue as prayed. It must be observed, from reading the petition and motion that the question of substitution without compensation is not presented for decision. The gravamen of the charge is the discharge of the attorneys without payment for services rendered, or the tender of payment or security, and a request to require payment as a condition precedent to a discharge. It is not alleged that the court has refused to recognize the attorneys as appearing of record for the defense, or that other attorneys have been substituted, or are about to be substituted, by order or with the consent of the court. Hence it follows that the only question presented is the right of the court, in a proceeding of this character, to require of defendant the payment to his attorneys of fees for services rendered, or to properly secure the payment of such fees.

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The weight of authority seems to hold to the proposition that a client may dispense with the services of an attorney at will, and upon whatever whim, and that a motion for substitution will be granted as a matter of course, subject to the attorney's lien upon a fund brought into court through his efforts, or on a judgment obtained by his services.—3 Am. & Eng. Ency. Law (2d Ed.) 409, and note; 5 Century Dig. p. 113. Our court has never extended the lien beyond a moneyed judgment, but has often held that no lien attaches to lands or other things, other than moneyed judgments.—*Higley v. White*, 102 Ala. 604, 15 South. 141; *Hinson v. Gamble*, 65 Ala. 605. At most, the right to control the discharge of an attorney is within the sound discretion of the court having jurisdiction of the cause, and will not be reviewed, unless it clearly appears that there has been an abuse of the discretion.

Pretermittting this inquiry, however, it does not appear that movants have not an adequate remedy at law. If they have rendered service under contract, they may recover under it in a court of law; and if not, and the respondent has received the benefit of such service and accepted it, they must recover on a quantum meruit. It is only in cases where there exists a clear legal right, and there is no other adequate remedy, that mandamus will issue. If the right is doubtful, mandamus is not proper. It follows from what has been said that the chancellor properly dismissed the petition. It is also clear that the rule should not issue.

The appeal on petition is dismissed, and the rule nisi denied.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.

[Zuber v. Roberts.]

Zuber v. Roberts.*Bill to Settle Partnership.*

(Decided Feb. 17, 1906. 40 So. Rep. 319.)

Partnership; Contract; Sharing Profits.—Where one rented a quarry, furnished all the capital to run the business, and assigned no part of his lease to another, who agreed to manage the quarry and commissary and give the business his time and attention, and to receive half of the net proceeds of the profits of the quarry and commissary and one half the rental of the houses, instead of a stipulated salary, constituted an agreement for services to be paid for from profits, and was not a contract of partnership.

APPEAL from Calhoun Chancery Court.

Heard before Hon. W. W. WHITESIDE.

This is a bill filed by Zuber for the dissolution of a partnership alleged to exist between complainant and Roberts and for an accounting. The facts sufficiently appear in the opinion of the court.

BURNETT, HOOD & MURPHY, for appellant.—Whether there existed a partnership is a question of intention of the parties to be gathered from the contract itself and the acts of the parties in carrying out the agreement as their construction of its terms and what they understood it to mean.—A. & E. Ency. of Law (1 Ed.) 905. A business which is really a partnership might be conducted in the name of one partner and yet the silent partner be held as a partner.—*Bank v. Hennessy*, 48 N. Y. 545. What is necessary to constitute a partnership *inter sese* is ably discussed in the following cases:—*Leggess v. Hyde*, 17 Am. St. Rep. 244; and numerous cases cited; *McClay v. Freeman*, 48 Mo. 234; *Cansler v. Wharton*, 62 Ala. 358; *Moore v. Smith*, 19 Ala. 774. The following cases are identical or similar in all essential features to the case at bar.—*Autrey v. Freeze*, 59 Ala. 587; *Lee v. Ryan*, 104 Ala. 125; *Dabb v. Halsey*, 16 John. 34; *McCrary v. Slaughter*, 58 Ala. 230.

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KNOX, ACKER & BLACKMON, for appellee.—The old rule that any sharing of profits constitutes a partnership has long since been abandoned in Alabama.—*Pulliam v. Schimpf*, 100 Ala. 364. Under the facts in this case the contract did not make the parties partners inter sese.—*Faile v. McCree*, 36 Ala. 61; *Robinson v. Bullock*, 58 Ala. 618; *Mayrant v. Marsten*, 67 Ala. 453; *Humes v. O'Brien*, 74 Ala. 64; *Nelms v. McGraw*, 93 Ala. 245. The court's attention is called to the following cases as sustaining the ruling of the Chancellor on the facts in this case.—*Taylor v. Bush*, 75 Ala. 432; *Houze v. Patterson*, 53 Ala. 205; *Autrey v. Freeze*, 59 Ala. 587; *Stafford v. Sibley*, 106 Ala. 192.

DOWDELL, J.—The bill in this case is filed for the purpose of a settlement of an alleged partnership between the complainant and respondent. The respondent, by his answer, denies the allegations of the bill as to the existence of any partnership between the parties. There was no contract in writing, and there was no express agreement between the parties for the creation of a partnership; and the determination of this question must be had from the terms of the agreement entered into between the parties, the character and conduct of the business, and the intention of the parties, to be gathered from the circumstances attending the entire transaction.

The evidence discloses that in 1900 Paul Roberts obtained a lease for the Alabama Consolidated Coal & Iron Company on a limestone quarry and entered into a contract to furnish said company with 200 tons of limestone a day for a term of three years. At this time the appellee was superintendent of the Alabama Consolidated Coal & Iron Company's furnace at Ironaton, Ala., and the appellant was an employe of said company under the appellee as superintendent. An agreement was subsequently entered into between the parties, whereby the appellee was to furnish the capital for the equipment of the quarry and for stocking a commissary, etc., and the appellant was to manage the quarry and commissary

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and for his services was to receive one-half of the profits derived from the quarrying of stone and one-half of the profits from the commissary, and, as the appellant states in his testimony, one-half of the rents collected on houses on the quarry premises. Operations were conducted under this arrangement for about two years, when the appellee made a contract with the Alabama Consolidated Coal & Iron Company whereby he surrendered his lease and canceled the contract for the supply of limestone during the unexpired time. He was paid a sum of money by the Alabama Consolidated Coal & Iron Company for the surrender of his lease and cancellation of the contract, and the appellant thereupon filed his bill for a settlement of the alleged partnership, claiming that he was entitled to participate equally with appellee in the sum received by appellee for the cancellation of the contract and the surrender of the lease, all of which the appellee denies, and appellee claims that the business was his alone, and that a division of the profits was only an adopted method of fixing the compensation of appellant for his services as manager of the business.

The evidence shows that the business was conducted in the name of Paul Roberts, or in the name of the "Consolidated Quarry," which latter name was used by appellee for the convenience of the Alabama Consolidated Coal & Iron Company in the keeping of their accounts, and not as a partnership name. The appellant claims and testifies that the name "Roberts & Zuber" was used in conducting the quarry business, and the evidence shows that the appellant had some bills of lading for lime rock made out in the name of Roberts & Zuber. The appellee, on the other hand, testified that he did not authorize or consent to the use of such name, and, upon being informed that such name was being used, he notified the agent of the railroad company and the clerk in the commissary, who made out the bills of lading, that the bills should not be so made. The evidence further shows that the goods for the commissary were purchased in the name of Paul Roberts, and, as shown by sundry exhibits attached to the deposition of Paul Roberts, the complainant, Zuber, would order goods for the commis-

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sary, signing the name 'Paul Roberts per R. B. Zuber,' on the paper of the "Consolidated Company," which had the names "Paul Roberts, Proprietor," and "R. B. Zuber, Mgr.," printed thereon. The account for lime rock shipped to the Alabama Consolidated Coal & Iron Company was kept in the name of Paul Roberts, and all settlements were made with Paul Roberts by checks drawn to his account. The capital for conducting the business was all furnished by the appellee. The lease on the quarry and the contract for the furnishing of stone, which made the business possible, were the property of the appellee, and were never by him transferred or assigned in any way to the appellant, in whole or in part. On the other hand, the appellant contributed to the arrangement only his services as manager, and for such services received, instead of a stipulated salary, one-half of the net profits. The appellant himself testifies that the agreement was that the appellee should put up the money in lieu of appellant's services, and certain profits were to be divided between them.

While the evidence shows a community of interest in the profits, it does not satisfactorily show that under the arrangement and conduct of the business there was to be any community in the losses. The appellant contends that the fact, which is undisputed, that he bore his part of the loss in the payment of damages for an injury suffered by one of the employees working in the quarry mines goes to prove that he was not only to share in profits, but in the losses of the business as well, and therefore he was a partner. As to this matter, the evidence shows that at the time the appellant objected to paying any part of said loss, and the evidence further explains why he consented to pay one-half, and this was not upon the ground of any partnership liability. The facts in the present case are very much like those in the case of *Taylor v. Bush*, 75 Ala. 432, where there was a contract for the conduct of a farm; the agreement providing that one party should furnish the farm and certain stock, tools, etc., the other to conduct it, keep an account of all expenses, and to make equal division of the net proceeds.

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It was said in that case: "In determining whether a partnership was created, the intention of the parties is the single question for consideration. There is a well-recognized distinction between cases where third persons have dealt with parties, associated in business as partners, and controversies between the parties themselves, or controversies in which the rights of such persons are not involved. In the one class of cases, a partnership may arise by mere operation of law, without an inquiry into or in direct opposition to the expressed intention of the parties. In the other class of cases, the question is as to the intention of the parties. * * *

The test of a partnership generally is whether there is a community of interests, a participation in losses and profits.—*Howze v. Patterson*, 53 Ala. 205, 25 Am. Rep. 607; *Autrey v. Frieze*, 59 Ala. 587. The rule is not without its exceptions; and when a party is without interest in the capital or business and is to be compensated for his services from the profits, or rewarded by the profits or what is to depend upon the result of an adventure or enterprise, the rule is without application. This contract is within the exception. The participation of Thomas in the profits was simply intended as compensation to him for his skill and services as the manager of the stock and plantation and in the cultivation and gathering of the crops." Again it is said in *Stafford v. Sibley*, 106 Ala. 192, 17 South. 324: "An agreement by which one is to share in the profits alone does not create a partnership. The agreement should bind the parties to share the burden of losses. One who is to receive for his share a percentage of net profits, and if there are no profits is to be paid nothing, in one sense is affected by losses; but if by the agreement he is to contribute nothing to make good the losses, if he is under no legal liability therefor, he does not bear the burden of loss in its legal signification as an element of partnership."

Applying this law to the facts in this case, as we gather them from the evidence, we are of the opinion that no partnership existed between the parties. To our minds, the weight of the evidence shows that it was never the

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intention of the parties to create a partnership, and that the agreement to divide the profits was only a mode, adopted by the parties, in fixing the appellant's compensation for the services which he was to render. It follows, therefore, that the decree appealed from must be affirmed.

Affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

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Bill to Enjoin the Collection of a Judgment.

(Decided Feb. 1, 1906. 40 So. Rep. 339.)

1. *Appeal; Transcript; Contents.*—Rules of Practice of Supreme Court No. 29 and 30 require that answers to original bill, before amendment, and which was embodied in the same paper with the demurrer, and the answer to the amended bill and exhibited thereto, to be copied in the record, unless the parties, or their attorneys, agree to their omission; and a motion to expunge them both from the record, in the absence of such agreement, will be overruled.
2. *Judgment; Confession of.*—When one signs a note in which is embodied a power of attorney authorizing a confession of judgment on failure to pay note at maturity, this is a waiver of notice, and a judgment rendered in accordance with the authority thus given is as valid and binding as if rendered on regular service of process.
3. *Insurance; Variance in Policy; Premiums.*—It is no defense to a note given for premium on an insurance risk that the form of the policy issued was different from that contracted for, it appearing that the policy was retained and no effort made within a reasonable time to ascertain that it was different and to return it for cancellation.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

This is a bill filed by W. H. Hutchinson against Pal-

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mer and Edwards, sheriff of Talladega county to declare void and to vacate, annul and enjoin a judgment rendered at law against him in favor of said Palmer by the city court of Birmingham. Demurrers were sustained to the bill as amended and the bill was dismissed for want of equity. On appeal the appellant moved to strike and expunge from the transcript of the record certain pleas and other things not necessary to set out. The facts are sufficiently stated in the opinion of the court.

WEBB & AMASON, for appellant.—The court erred in sustaining demurrers to the bill as last amended and in sustaining the motion to dismiss for want of equity.—89 Ala. 214; 50 Ala. 69; 16 A. & E. Ency. of Law, p. 357-8. Delay in filing the bill to enjoin an action at law, when a court of law cannot possibly deal with the subject-matter, will not deprive the party of his right to file an injunction.—27 Ala. 104; 121 Pa. State Rep. 260. A misrepresentation was made to complainant on which he relied in the making and execution of the insurance policy and is such a fraud as confers upon him the right to avoid the contract.—99 Ala. 558; 6 Port. 344; 30 L. R. A. 33; 58 Am. St. Rep. 249. The provisions in the notes for a confession of judgment without notice or service upon appellant was void in that they were repugnant to the common law and opposed to public policy.—*O'Hara v. Lanier*, 1 B. Mow. (Ky.) 100; *Rankin v. Lawrence*, 4 Rich. L. (S. Car.) 267; 35 Am. Rep. 524; 35 Am. Dec. 419; *Oil City v. McAbey*, 74 Pa. St. Rep. 249. The judgment was wholly void because rendered in a county in which defendant had no place of residence and without service of notice upon him.—§ 4205, code 1896; *Oil City v. McAbey*, *supra*.

WARD & WARD and WARD & HOUGHTON, for appellee.—A man may waive any right given him by law pertaining to civil suits and rights.—29 A. & E. Ency. of Law, p. 1107; *Lee v. Tillotson*, 35 Am. Dec. 624 and note. Warrant of attorney to confess judgment is a waiver of notice of suit.—*Teale v. Yost*, 13 L. R. A. 796. And such war-

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rant may be given to any attorney generally.—13 L. R. A. 796; 33 Ib. 83; 44 Ib. 840; *Giddens v. Crenshaw County*, 74 Ala. 471; *Vliet v. Camp*, 13 Wis. 221; *Sweeney v. Kitchen*, 80 Pa. St. Rep. 160. If the judgment is void as alleged the court can set it aside and the parties acquire nothing by it. A resort to chancery is therefore unnecessary.—*Bland v. Bowie*, 53 Ala. 152; 60 Am. St. Rep. 642; 15 Ency. P. & P. 332. The judgment could be vacated on appeal, if void.—*Winnimore v. Matthews*, 45 Ala. 449; *Shepherd v. Powell*, 50 Ala. 377; *Shelton v. Gill*, 11 Ohio 417; *Cranville v. Bacon*, 91 Am. Dec. 451. The judgment confessed will not be enjoined if no fraud is practiced in obtaining it.—*Moore v. Barclay*, 23 Ala. 739; 29 Ala. 471; 35 Ala. 539. If the fraud had been practiced, complainant could have compelled the surrender and cancellation of the notes and this he ought to have done.—*Bibb v. Hitchcock*, 49 Ala. 478; *James v. Howell*, 40 Am. St. Rep. 494. All that was said pending the negotiation was merged into the written completed contract.—*Banks v. Moore*, 139 Ala. 624; *Mobile L. Ins. Co. v. Pruitt*, 74 Ala. 497. There was no offer to do equity by returning the policy when the alleged fraud was discovered.—*Young v. Shepherd*, 44 Ala. 315; *Hatcher v. Branch*, 37 So. Rep. 690. By keeping the policy and delaying its return he ratified the contract he received and his bill is not amendable.—High on Injunctions, §§ 188-205-279; 106 Ala. 352; 54 Am. St. Rep. 59.

SIMPSON, J.—This was a bill in the chancery court by appellant against the appellees, seeking to enjoin the collection of certain judgments in the city court of Birmingham against appellant; said judgments having been rendered on notes of appellant, in which were embodied powers of attorney authorizing the confession of judgment on the same if not paid at maturity. The bill alleges that said notes were given for a certain insurance policy then applied for, which policy, when delivered, was of a different character from the one which he had been led to expect by the representation of said defendant, J. T. Palmer, who was acting as agent of the State Mutual Life & Annuity Association of Rome, Ga. Sev-

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eral amendments were filed to the bill, and the chancery court finally sustained a demurrer to the bill as amended, and also a motion to dismiss the bill for want of equity. Said life insurance association is not made a party to the bill.

The appellant moves this court to strike and expunge from the record the answer of the defendant to the original bill, before amendmnet, and which was embodied in the same paper with the demurrer; also the answer to the amended bill, with the exhibits thereto. The transcript, which is required to be sent to the appellate court on appeal, consists of the entire record of the proceedings up to the time of appeal.—2 Ency. Pl. & Pr. pp. 259, 260. Our rules of practice provide that certain things shall not be copied into the record, but as to other parts of the proceedings, including those here sought to be expunged, our rules permit their omission only on agreement between the parties, or their attorneys.—Rules of Practice 29, 30, Supreme Court; Code 1896, pp. 1191, 1192. The motion is overruled.

Admitting the principle invoked by the appellant on the subject of the right of a defendant to have notice of proceedings against him before a valid judgment can be rendered against him, yet this is a right which can be waived by him, and if he executes a note, in which he embodies a power of attorney authorizing an appearance and confession of judgment on failure to pay the note at maturity, this is a waiver of notice, and a judgment rendered, in accordance with the authority therein given is as valid and binding as if rendered on regular service of process.—30 Am. & Eng. Ency. Law (2d Ed.) 110, 111; *Teel v. Yost*, (N. Y.) 28 N. E. 353, 13 L. R.A. 796; 11 Ency. Pl. & Pr. 985, 987, 989; *First Nat. Bank of Athens v. Garland*, (Mich.) 67 N. W. 559, 33 L. R. A. 83, 63 Am. St. Rep. 597; *Van Norman v. Gordon*, (Mass.) 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; *Caller v. Denison*, Minor, 19;; *Hodges & Puckett v. Ashurst*, 2 Ala. 301.

It is claimed, however, in the bill of complainant, that the policy which was delivered did not contain any stipulations for certain concessions which he was to have.

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In the first place, it is observed that the only allegation in regard to the kind of policy which complainant was to receive is that the "policy for and in consideration of which only said promissory notes were executed and delivered was," etc. The bill does not allege by whom or how the representations were made that he was to receive such a policy, but it does state that he made a written application for said policy to said insurance association "upon the terms and conditions that are averred and set out in paragraph 3 of the bill of complaint," in which it was stated: "I have read a sample blank form of the policy applied for, to be issued on the above-named plan, and I hereby accept the conditions of the same. * * * I agree that no statement, promises, or information made or given by the person soliciting this application shall be binding on the association, unless such statements, promises, or information be reduced to writing and presented to the officers of the association at the home office in this application. The application and the policy hereby applied for taken together shall constitute the entire contract between the parties hereto." It is evident that complainant had the original written application, or a copy of it, from the extensive quotation which he makes from it, yet he does not set it out, or make it an exhibit to his bill, but, on the contrary, moves to expunge that part of the record which contains it.

The complainant still has in his possession the policy issued to him, has never offered to deliver it up, does not make the life assurance association (to which he made the application and which issued the policy in question) a party to this bill, nor does he ask for a rescission of the contract or cancellation of the policy. The application was made January 30, 1903, and the policy presumably delivered soon after, and complainant alleges that it was two months thereafter when he discovered that it was not the kind of policy he had contracted for, and that he did not return it, but merely kept it in his possession without receiving and accepting it as the policy he had applied for, and, even in September, 1903, when the attorneys demanded payment of his said notes he merely informed them of his dissatisfaction with the policy and

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refused to pay the notes, and has since had no further correspondence with them or any one else in regard to the matter. Without dwelling upon other matters which are patent upon the statement of the facts, even if the complainant had a cause of action otherwise, he could not hold the policy and refuse to pay the notes which were given for the premiums. If the policy received was different from that which he had contracted for, it was his duty to ascertain that fact within a reasonable time and return it for cancellation.—16 Am. & Eng. Ency. Law, 953; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *Allen v. Smith*, (Ala.) 39 South. 615.

The decree of the court is affirmed.

TYSON, DOWDELL, and ANDERSON, JJ., concur.

Patterson, *et al.* v. Carter, *et al.*

Bill to Annul Judgment at Law and Revoke Letters of Administration.

(Decided April 28, 1906. 41 So. Rep. 133.)

1. *Judgment; Equitable Relief; Parties Entitled.*—Equity will relieve the heirs of a judgment against the administrator, where such judgment was obtained through collusion with the administrator, or on account of a failure on his part to use due diligence to defend the action, unless the judgment was for a valid and subsisting claim.
2. *Executors and Administrators; Claims against Estate.*—The presumption is that one rendering service to decedent, who stood in *loco parentis* to her, does so without the expectation of receiving payment therefor, but the presumption may be overcome by evidence showing a contrary intent between the parties.
3. *Witnesses; Competency; Transaction with Decedent.*—In an action against an administrator seeking to recover against such

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for alleged services rendered decedent in life, plaintiff was incompetent under § 1794, Code 1896, to give testimony concerning transactions with or services rendered to decedent.

4. *Executors and Administrators; Claims against Estate; Evidence; Sufficiency.*—In an action for services rendered decedent by a member of her family, the fact that decedent said that she wished plaintiff to have certain property after decedent's death, did not tend to show liability for such services.

APPEAL from Marshall Chancery Court.

Heard before HON. W. H. SIMPSON.

This was a bill filed by the heirs and grandchildren of one Sarah Patterson seeking to set aside a judgment by default rendered at the suit of Sealey Patterson against W. H. Carter as administrator of said Sarah Patterson. The bill alleges collusion between the plaintiff in the suit and the administrator or a failure on the part of the administrator to exercise diligence in defending the suit. It sets up that there was no necessity for an administration and no demands against the estate except the simulated demand of Sealey Patterson and denies that the estate owes Sealey Patterson anything. The bill seeks also a revocation of the grant of letters of administration. The other facts sufficiently appear in the opinion.

JOHN A. LUSK, for appellant.—If respondent was entitled to any wages at all they were due at the end of the week or the month and the statute of limitations began to run at the end of that time.—*Hood v. League*, 102 Ala. 228; *Strauss v. Metcalf*, 64 Ala. 299. Long before the suit was brought the claim was barred by the statute of limitations and if the administrator could waive it as to the personal assets he could not as to the real estate.—*Teague v. Corbett*, 57 Ala. 543. The fact that the administrator did not plead the statute of limitations does not prevent the heirs at law from asserting it when proceedings are instituted for an order to sell.—*Scott v. Ware*, 64 Ala. 174; *Teague v. Corbett*, *supra*. Chancery will not subject real estate until the personal property is exhausted.—*Bank v. Spears*, 103 Ala. 445. Letters of administration improvidently granted may be revoked either by the court granting or by the chancery

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court.—*Owens v. Child*, 58 Ala. 113; *Koger v. Franklin*, 79 Ala. 505; *Watson v. Glover*, 77 Ala. 323. The probate court has no jurisdiction to sell lands of decedent to pay costs of administration.—*Bolen v. Hoven*, 39 So. Rep. 379. If deceased took Seeley Patterson to her home and raised her and she lived there as one of the family she was not entitled to any compensation.—21 A. & E. Ency. of Law, 1061.

STREET & ISBEL, for appellee.—Counsel discuss assignments of error but cite no authority.

ANDERSON, J.—The bill avers facts from which it can be concluded, and which averments are supported by the proof, that the judgment was obtained against the administrator, either by collusion with him, or, at least, from a failure on his part to use proper diligence to defend the suit; and, such being the case, a court of chancery will relieve the heirs, unless it was for a valid and subsisting claim. The evidence shows that the plaintiff to the judgment, Celia Patterson, was reared by the intestate and continued and lived with her until her death, and practically occupied the same relationship with the decedent, the latter years of her life, that she did for a number of years previous to her death. She performed certain services in and about the place and for the deceased, and in return received a maintenance and support at what was to all intents and purposes their common home. She was practically a part of the family of Mrs. Patterson, who stood in the relation of a parent, and the presumption is that no payment is expected for services rendered or support furnished by the one to the other. "This presumption is not, however, conclusive, and may be overcome by proof either of an express agreement to pay or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made. Whenever, therefore, compensation is claimed in any case by either parent or child against the other for services rendered, or the like, the question whether the claim should be allowed must be determined from the particular circumstances of the case. There can be no

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fixed rule governing all cases alike. In the absence of any direct proof of an express contract, the question which must be determined is whether it can be reasonably inferred that pecuniary compensation was in the view of the parties at the time when the services were rendered or the support was furnished; and the solution of this question depends upon a consideration of all the circumstances of the case."—21 Am. & Eng. Ency. Law, 1061. The only evidence to show that it was within the contemplation of the parties that Celia Patterson was to receive compensation for her services was her own testimony, which was clearly prohibited by section 1794 of the code of 1896, and which should have been excluded. With this evidence excluded there is none remaining to support her claim. There was some proof as to what Mrs. Patterson said she wished Celia to have after her death, but which, instead of evidencing a subsisting liability, tended to indicate that, as her attentions to her were gratuitous, she desired to make some provision for her after her death, and she did not recognize that Celia Patterson had a charge against her estate for services. Nor does it appear from the evidence that it was within the mind or contemplation of the parties that any relationship existed the last few years different from those under which they lived so many years previous.

The chancellor erred in refusing complainant relief, and the decree is here reversed, and one here entered annulling and vacating the judgment and revoking the letters of administration.

Reversed and rendered.

HARALSON, DOWDELL, and DENSON, JJ., concur.

[Collier v. Parish.]

Collier v. Parish.***Bill to Annul a Decree Obtained by Fraud and Misrepresentation.***

(Decided May 19, 1906. 41 So. Rep. 772.)

1. *Judgment; Equitable Relief; Meritorious Defense.*—In order to obtain equitable relief against a decree on the grounds of fraud, the complainant must show that he had a meritorious defense which can be established by evidence upon another trial, that the judgment was taken by fraud of respondent, and that complainant was not negligent.
2. *Same; Evidence; Sufficiency.*—The evidence considered in this case and held insufficient to show fraud, or the absence of negligence on part of complainant.

APPEAL from Pike Chancery Court.

Heard before HON. W. L. PARKS.

Bill by W. I. Parish against A. A. Collier. From a decree in favor of complainant, defendant appeals.

This was a bill filed by appellee against appellant, seeking to annul a decree theretofore made and entered by the chancellor in a suit by A. A. Collier against the appellant to enforce a vendor's lien, alleging a final decree on bill and decree pro confesso against this complainant for the sum of \$454.31, besides the cost, and a decree ordering the land to be sold and the fact that said land was advertised to be sold, alleging an agreement between complainant and J. B. Collier, to whom it is alleged the vendor's note was given, by which a satisfactory adjustment of the payments was made and an agreement on Collier's part to dismiss the bill seeking to enforce the vendor's lien, and a reliance upon the promise of Collier that the case would be dismissed, and his further representation that it had been dismissed, alleging also a submissal to arbitration as to the payments complainant had made on the land, the proper selection of said arbitrators, and their return finding that complainant had paid Collier \$27 more than was due on said note, and also alleging that said decree was obtained by fraud and misrepresent-

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tion, and that A. A. Collier claimed afterwards to be the transferee of said note. The chancellor granted relief prayed for in the bill, and from this decree this appeal is prosecuted.

BRANNEN & GARDNER, and J. M. CHILTON, for appellant.—The court erred in overruling the motion to dissolve the injunction for want of equity in the bill in that the bill fails to show that complainant had a meritorious defense to the original action which he was prevented from making by fraud unmixed with negligence on his part.—*National Fert. Co. v. Henson*, 103 Ala. 532; *Alston v. Maricell*, 112 Ala. 641; *Belcher v. Scruggs*, 125 Ala. 341; *Norman v. Burns*, 67 Ala. 248; *Waldron v. Waldron*, 76 Ala. 385. The court erred in refusing to dismiss the bill for want of equity as above alleged.—Authorities *supra*; *Ex parte Wallace*, 60 Ala. 267. A bill to impeach a decree for fraud is an original bill in the nature of a bill for review.—*Stallworth v. Blum*, 50 Ala. 46; *Gordon v. Ross*, 63 Ala. 363; *Ex parte Smith*, 34 Ala.; *Curry v. Peebles*, 83 Ala. 225. It follows therefore, that the chancellor erred in granting the relief prayed for in this case. The proper practice is to place the parties in statu quo, that is to say to open the original suit and try the same de novo.—*Algood v. Bank of Piedmont*, 130 Ala. 237.

Parrish was not competent to testify as to the transaction with deceased partner from whom the owner of the purchase money notes acquired them.—§ 1794, code 1896; *Louis v. Easten*, 50 Ala. 470; *Sublett v. Hodges*, 88 Ala. 491. The theory upon which the bill is filed is untenable. Mrs. Collier filed a bill to enforce the vendor's lien and the bill nowhere avers that either Mrs. Collier or her solicitor had any notice or information whatever of the fraud alleged to have been perpetrated by A. A. Collier.—*Jackson v. Smith*, 75 Ala. 97; *Burns v. Campbell*, 71 Ala. 271; *Ala. State Land Co. v. Reed*, 99 Ala. 19; *Wheeler v. McGuire*, 86 Ala. 402; *Scales v. Mount*, 93 Ala. 82.

FOSTER, SAMFORD & CARROLL, for appellee.—If the acts

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of the supposed agent are of such a character and so continuous, as to furnish a reasonable ground of inference that the supposed principal knew of them, and would not have permitted the assumed agent thus to act, in the absence of authority, the acts are competent evidence of agency.—*Reynolds v. Collins*, 78 Ala. 97; 39 Ala. 33; 38 Ala. 208.

The principal is liable for the fraudulent acts of the agent in the course and within the scope of his employment, though in fact the principal did not authorize the practice of such fraud.—1 Am. & Eng. Encyc. of Law (2d Ed.) 1158. While the existence of a fact cannot be proved by reputation, yet when the fact is established, notoriety in the neighborhood may be proved as competent evidence to charge one resident there with notice of it.—*Woods v. Montevallo*, 84 Ala. 564; *Schlaff v. L. & N. R. R.*, 100 Ala. 377; *Cleveland v. Sibert*, 81 Ala. 140; *Central v. Smith*, 76 Ala. 578. The fraud alleged in the bill is held to be sufficient.—2 Freeman on Judgments, § 92. Parish can testify as to any transactions with G. C. Collier, who was not the agent of A. A. Collier, but of J. B. Collier.—*Nelson v. Howison*, 122 Ala. 578. G. C. Collier's books are not admissible: 1. Because the transaction was with J. B. Collier, and not G. C. Collier; (2) because it is not shown on these books Parish was charged with this note; (3) because some of the entries introduced as evidence are not the original entries of the items represented.—3 Mayfield, page 523, 1716.

SIMPSON, J.—The first and second assignments of error relate to the action of the court in its decree of January 1, 1902, overruling the motion to dissolve the injunction and to dismiss the bill for the want of equity. Those were motions with regard to the original bill, which was afterwards amended by the filing of the amended bill on which issue was taken and the cause submitted. It is too late now to assign such action of the court as error. Practically the same questions come up in disposing of other assignments of error going to the merits of the case and the action of the court in rendering the decrees.

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The prayers of the bill are, first, for a temporary injunction, with the usual prayer that it be made perpetual; second, that the decree be declared null and void on account of fraud, that orator be permitted to come in and defend against the claim of said respondent, and that a reference be ordered to the register to ascertain the amount of the unpaid purchase money and what amount if any remains due. The decree is that complainant is entitled to relief and to have the temporary injunction made perpetual, which is decreed, and it is further decreed that Parish is not indebted to A. A. Collier in any amount for the purchase of the land, nor upon the note or notes given to the complainant for the land, nor on the notes described in the pleading. Under our decisions, the dignity of a judgment is such that, in order to set it aside even on the ground of fraud, the complainant must prove that he had a meritorious defense which could be established by evidence on another trial, and that the judgment was taken by the fraud of the opposite party unmixed with negligence on his own part. Thus, although the judge had announced that no civil cases would be taken up, and that all parties interested could go home, and the opposing counsel afterwards obtained the judgment by stating to the court that it had been agreed on, this court held that the party was not entitled to relief because he failed to put in a plea.—*National Fert. Co. v. Hinson*, 103 Ala. 532, 15 South. 844. And in a case where the party trusted to the verbal assurance of the attorney of the opposing party that no judgment would be taken, in place of insisting on having the agreement in writing, the court said: "The circumstances which are relied on to excuse failure to defend at law must have been such that no exercise of diligence on his part could have guarded against," etc.—*Norman v. Burns*, 67 Ala. 248, 252. See, also, *Ex parte Wallace*, 60 Ala. 267; *Collier v. Falk*, 66 Ala. 223.

All of the authorities hold that the proof of the essential matters shall be clear and convincing. The complainant in this case rests his case entirely upon the verbal

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assurance which he claims that J. B. Collier gave him. Pretermittng for the time being the question as to the legal sufficiency of the facts, even admitting them to be just as testified to by the complainant, the burden certainly rested on him to prove, by that clear and conclusive testimony which the law requires in such cases, first, that J. B. Collier was the agent of A. A. Collier in the management of his case, with authority to dismiss it, and, second, that he did make the statement as claimed in this bill. There is not a particle of proof about the agency, except some vague statements about looking after some lands for his wife and having looked after some cases in the justice of the peace court, none of which tended to show that he was clothed with the authority claimed in regard to this particular case. It is shown, too, by the testimony of the complainant himself, that he knew that Mr. Hubbard, the attorney, had possession of the notes and had brought the suit; also that, when he went to Mr. Hubbard once to get the notes for a short time, Mr. Hubbard refused to let him have them unless he would bring a written order from Mrs. A. A. Collier. He also states that J. B. Collier never told him that he was authorized to dismiss the suit, but only that what he did would be all right. He also admits that, while he does not recollect it, Mr. Hubbard may have told him (as Mr. Hubbard swears he did) that he (Hubbard) had charge of the matter, and that complainant had better get a lawyer and put in his answer, or a judgment would be taken against him. He also admits that it may be true, as testified to by Mr. Hubbard, that J. B. Collier told him, in Hubbard's presence that he had nothing to do with the case, and that it was in Hubbard's hands. Taking his own testimony, in connection with that of Mr. Hubbard, the proof utterly fails on the question of agency and as to what was really said. The complainant relies entirely on his own testimony which is contradicted by J. B. Collier. The complainant filed no answer, did not even inquire of the register as to whether the suit was dismissed, nor of the attorney who had possession of the note and was in charge of the case. We hold that his contention is not sup-

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ported by that convincing evidence which the law demands, and he has not acquitted himself of all fault or negligence as the law requires in order to set aside the decree of the court.

These rules of law may sometimes work hardship; but, looking to the general good, the law deems the integrity of the judgments of our courts too important to allow them to be disturbed by a less measure of proof. The decree of the court is reversed, and a decree will be here entered dismissing the bill.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON, and DOWDELL, JJ.,
concur.

Hughes v. Clifton, *et al.*

Bill to Foreclose Mortgage.

(Decided July 6, 1906. 41 So. Rep. 978.)

Tender; Sufficiency of; Interest; Time and Computation.—The mortgagor went to a party who had previously been mortgagee's agent and paid a certain installment of interest; afterwards, the mortgagor came to the same person and told him that he desired to pay the mortgage debt and interest, but was informed that the mortgage had been turned over to mortgagee's administrator. The mortgagor and the former agent of the mortgagee agreed that the money should be paid to a third person to be turned over to the administrator on the surrender or delivery of the mortgage. Held, not such a payment or tender of the amount due as to discharge the debt or stop the running of interest.

APPEAL from Madison Chancery Court.

Heard before HON. W. H. SIMPSON.

Bill by James Hughes as administrator of the estate of John Hughes, deceased, against Wesley Clinton, and others. From a judgment for defendants, plaintiff appeals.

This was a bill filed by the appellant as the administrator of the estate of John Hughes, deceased, seeking the foreclosure of a mortgage on land executed by Wesley Clinton and wife to said Hughes. The defendants interposed demurrers and pleas to bill, but the demurrers were overruled and the pleas held insufficient. All the defendants except Wesley Clinton failed to answer the bill and a decree pro confesso was entered against them. Wesley Clinton filed an answer setting up a payment of a certain installment of the interest to one A. R. Campbell alleged to be the agent of the mortgagee; also setting up that he went to said Campbell and informed him that he desired to pay the mortgage debt together with the interest due on the mortgage and was informed by Campbell that the mortgage was in the possession of said administrator. It was agreed between respondent and Campbell that the amount of the mortgage debt and interest due on it should be paid to one McCorley who should hold the said money until the mortgage was obtained from said Hughes. It is contended that Campbell never obtained the mortgage. The chancellor decreed a foreclosure of the mortgage but denied to complainant interest on the same after the payment of the money to McCorley, and decreed costs against complainant. From this ruling this appeal is prosecuted.

WALKER & SPRAGINS, for appellant.—The rule has been strictly adhered to in all the adjudged cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal.—*Haynes v. Pohlmann*, 25 N. J. Eq. 183; *Smith v. Kidd*, 68 N. Y. 130; *Jones on Mortgages*, (4th Ed.) § 964. There can be no valid tender unless it is made to the person to whom the money is due or to his duly authorized agent.—25 A. & E. Ency. of Law, 918. Complainant was improperly taxed with the costs.—§ 1325, code 1896; *Burbaum v. McCorley*, 99 Ala. 537. The defendant lost all benefit of any tender at any time by failing to pay the money into court.—*McGuire v. VanPelt*, 55 Ala. 351; *Park v. Wiley*, 67 Ala. 210; 25 A. & E. Ency. of Law, 940. As against the foreclosure of the mortgage

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no period of time less than twenty years will avail as a bar.—*Ohmer v. Boyer*, 89 Ala. 282.

COOPER & FOSTER, for appellee.—Under the facts in this case such an agency was shown to exist as bound the principal by the payments made to the agent.—*Tabler v. Sheffield*, 87 Ala. 305; *K. C. M. & B. R. Co. v. Ivey Leaf Coal Co.*, 97 Ala. 705; 22 A. & E. Ency. of Law, 518. Having induced appellee to deal with Campbell, appellee is protected until there was a revocation of the agency of which he had notice.—*Wheeler v. McGuire*, 86 Ala. 398; *Whitefield v. Riddle*, 78 Ala. 99; *Con. F. Ins. Co. v. Brooks*, 131 Ala. 614. A state of facts or condition of things once shown to exist will be presumed to exist until the contrary is shown.—*Land Co. v. Kidd*, 99 Ala. 474; *McKenzie v. Stephens*, 19 Ala. 691; *Poe v. Dorrough*, 20 Ala. 288. Complainant had no right to receive payment of the mortgage debt, and a payment to him, or a deposit in court for him would have been void.—*Sloan v. Frothingham*, 65 Ala. 598; *Hatchett v. Burney*, Ib. 39.

ANDERSON, J.—“As a general rule, a mortgage debtor is authorized to infer that an attorney or agent, who has been employed to make a loan and retains possession of the bond and mortgage, is empowered to receive payment of both the interest and of the principal. But this inference is founded on his custody of the securities, and it ceases when these are withdrawn by the creditor; and it is incumbent on the debtor, who relies upon a payment so made to an attorney or agent, to show that the securities were in his possession when he made the payment, unless the action of the creditor be such as to estop him from denying the agency. * * * In making payments to an agent, the mortgage debtor should be assured of his continued authority to act for the owner of the mortgage; and such assurance of this as may be derived from his possession of the mortgage note or bond, and indorsement thereon of the payment, would be omitted only through great negligence. Authority of an agent to receive interest or principal on a mortgage cannot be inferred from the fact that the agent collected and paid

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over to the mortgagee interest on other mortgages. Even authority to collect the interest upon a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities. The rule has been strictly adhered to in all the adjudicated cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal."—Jones on Mortgages, vol. 2, § 964. In the case of *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157, the court said: "If money be due on a written security, it is the duty of the debtor, if he pay to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet, if the securities do not remain in his possession, a payment to him will not discharge the debtor." In the case of *Haines v. Pohlmann*, 25 N. J. Eq. 183, the court in discussing the question, said: "But the inference in such case is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes the payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made."

The payment in this case was made to a person other than the alleged agent of complainant, but conceding that it was equivalent to making it to Campbell, who sanctioned it, the undisputed evidence shows that Campbell did not have the securities, and so informed respondents' agent, and agreed to try and get the note and mortgage, and the deposit was made with McCorley to be paid over to complainant or his agent upon a surrender or delivery of the securities. This was in no sense such a payment or tender, as would operate as a discharge of the debt and thereby stop the interest. The case of *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, relied upon by the learned chancellor, has no application to the case at bar; there the place of payment was designated in the bonds and the court properly held "that the

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designation of the place of payment of the bonds imparted a stipulation that the holder should have them at the bank when due, to receive payment and that the obligors would produce there the funds to pay them." Here we have no designated place of payment either in the note or mortgage. We do not wish to be understood as holding that there is not an exception to the foregoing rule, when the creditor absents or obscures himself, so that the debtor cannot, by ordinary diligence, locate him, but in the case at bar there is no legal evidence to show that the respondent was sufficiently vigilant to bring himself within the exception.

The chancellor properly rendered the decree of foreclosure, but erred in disallowing the complainant interest and in taxing him with the costs; and the decree in this respect will be reversed, and the register is ordered to include the interest and costs in ascertaining the amount to be paid by the respondents, and is ordered to sell the land under the terms of the decree, if said sum including principal, interest, and costs is not paid within 30 days from the rendition of the decree of this court.

Affirmed in part, and in part reversed and rendered.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

Etheridge Bros. v. Swann-Abrams Hat Co., et al.

Bill for Discovery.

(Decided June 7, 1906. 41 So. Rep. 465.)

Creditors Suits; Discovery of Assets; Parties; Nature of Claim.—

The fact that some of the claims of some of the creditors were in the shape of notes with waiver of exemptions as to personal property does not render the court unable to grant relief under §§ 819, 820, Code 1896.

[*Ethridge Bros. v. Swann-Abrams Hat Co., et al.*]

APPEAL from Conecuh Chancery Court.

Heard before HON. W. L. PARKS.

Action by the Swann-Abrams Hat Company and others against Etheridge Bros. and others. From a judgment for plaintiffs, defendants appeal.

HAMILTON & CRUMPTON, for appellant.—As to the law governing the requirements of a bill of discovery attention is directed to the following cases: *Pollack v. Clafflin Co.*, 138 Ala. 644; *M. & F. R. R. Co. v. McKenzie*, 85 Ala. 551; *Shackelford v. Bankhead*, 72 Ala. 476.

JAMES F. JONES, for appellee.—The first ground of demurrer is general and properly overruled.—§ 700, code 1896; *Dickerson v. Winslow*, 97 Ala. 491; *Pate v. Henson*, 104 Ala. 599; *George v. R. R. Co.*, 101 Ala. 612. The bill contains every allegation necessary in bills of this character.—*Drennan v. Ala. Nat. Bank*, 117 Ala. 310; *Sorrell v. Vance*, 102 Ala. 207; *Sweetzer v. Buchanan*, 94 Ala. 574; *M. & F. Ry. Co. v. McKenzie*, 85 Ala. 540. The fact that no interrogatories were incorporated with the bill does not render it subject to demurrer.—*McKissack v. Voorhees*, 119 Ala. 101. That complainant had an adequate remedy at law must be taken advantage of by plea and not by demurrer.—*Dunn v. Timberlake*, 104 Ala. 266. A demurrer good in part only should be overruled.—*Goodwin v. Whitehead*, 95 Ala. 409.

SIMPSON, J.—The bill in this case was filed by appellees (complainants) against appellants, alleging that the defendants were indebted to complainants severally, in various amounts by accounts and notes, some of the latter containing waiver of exemptions. The bill alleges that the defendants have no property subject to legal process, but have large sums of money and other property, unknown to complainants, which they are concealing, etc., and prays for the ascertainment of the amount due each of said complainants, and that judgment or decrees be rendered for the amounts so found to be due, and that defendants be required, under oath, to disclose all property, real, personal, and mixed, including choses in ac-

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tion, owned by them, etc. The appeal is from the decree overruling demurrers and the motion to dismiss for want of equity.

Section 819, code of 1896, provides that a judgment creditor, "or a creditor without lien or judgment," may file a bill for the discovery of assets. Section 820 authorizes any number of creditors to join as complainants in such a bill.—*McKissack v. Voorhees, Muller & Co.*, 119 Ala. 101, 24 South. 523. The bill is mainly for the discovery of assets, and the fact that some of the claims contain waiver of exemptions does not render the claims so incongruous as to render it beyond the power of a court of equity to grant the relief prayed, as the court can so mold the decree as to meet the requirements of the law. Similar proceedings under these statutes have been frequently sustained by this court.—*M. & Fla. Ry. v. McKenzie*, 85 Ala. 546, 5 South. 322; *Sweetzer, P. & Co. v. Buchanan*, 94 Ala. 574, 10 South. 552; *Drennen v. Ala. Nat. Bank*, 117 Ala. 320, 23 South. 71; *Sorrell v. Vance*, 102 Ala. 207, 14 South. 738; *Kinney v. Reeves*, 142 Ala. 604, 39 South. 29.

The decree of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

Harris, et al. v. Stevenson.

Bill to Set Aside Sale.

(Decided June 30, 1906. 41 So. Rep. 1008.)

1. *Judicial Sales; Vacation; Collateral Attack; Diligence.*—Unless the party seeking relief acquit himself of want of diligence in resisting the confirmation of the sale, where property had been sold under a chancery decree, and the same has been confirmed, it will not be set aside in a collateral proceeding.
2. *Execution; Sale; Setting Aside; Inadequacy of Price.*—A bill seeking to set aside a sale of land under execution for inadequacy of price, which shows on its face that, though the sale

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included all of the tract, the most valuable part had been previously sold under a chancery decree and the sale confirmed, and the bill contained nothing to negative the fact that the amount paid at the execution sale was less than the value of the lands sold, which was not covered by the chancery sale, the bill was demurrable.

3. *Estoppel; Judicial Sale.*—The rule that the levy and sale of property by a person in general estops him from denying that the other party has a leviable interest therein, does not extend to the divestiture of rights under previous sales made under a different process.

APPEAL from Morgan Chancery Court.

Heard before HON. W. H. SIMPSON.

This was a bill filed by appellee against appellants seeking to have set aside the sale of certain land made by the register in chancery on the 22d day of February, 1897, the sale of a part thereof on May 28, 1903, and the sale of the entire tract on November 23, 1903, unless the defendant Harris will credit his said judgment or deficiency decree with the just and fair value of said land, and unless said credit is made that the court will order all of said lands to be again sold free from any incumbrance or clouds cast on the same by any of the sales heretofore made and for general relief. The allegations of the bill are that prior to February, 1897, complainant, Stephenson, was seized and possessed of 1 house and 10 acres of land off the north end of the N. E. 1-4 of section 36, township 5, range 5, in Morgan county, said land being on the west side of the Decatur and Danville road; that on the 23d day of February, 1897, the register of the chancery court of Morgan county, pursuant to a decree of the court rendered on the 7th day of September, 1896, sold 1 house and 10 acres of land lying two miles southwest of Decatur, Ala., and being part of the northern end of the N. E. 1-2 of the N. W. 1-4 of section 36, township 5, range 5, in Morgan county, Ala.; that at said sale C. C. Harris became the purchaser of the land for the sum of \$50; that the sale was reported to the court and by it confirmed; that under said sale Harris went into possession of said land by causing the tenant of orator to attorn to said Harris, although only a small

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part—about one-half or less—of orator's land had been actually sold at said sale; that on the 10th day of April, 1897, Harris filed in this court a bill seeking to reform the description of the land so as to make it contain the proper description of the land intending to be sold, but that on the 2d day of June this bill was dismissed out of the court by Harris. The bill alleges that the sale included that part of the land containing the house and improvement which was worth a large sum of money, to-wit, \$700 or \$800, and that said sale was for a grossly inadequate price owing in part to the defective description, and which said Stephenson in the bill above referred to says that, owing to the awkwardly expressed description, and the mistake in the distance from the town of Decatur, and the fact that complainant Stephenson repudiates said sale creates a cloud upon Stephenson's title and affects the market value of the land, orator avers that such description did effect the value of the land. The bill further alleges that on the 23d day of March, 1903, an execution was sued out upon a personal decree which said Harris had obtained in said chancery court proceedings after said credit on the mortgage indebtedness of the \$50 bid by Harris at the register's sale, and under the said execution and on the 20th day of May, 1903, the sheriff sold the S. 1-2 of the aforesaid 10 acres at public outcry to said Harris for the sum of \$25; that said sum of \$25 was a grossly inadequate price for the land, as it was intended to include all of orator's land not previously purchased at the aforesaid register's sale, and that the two prices bid and paid were grossly inadequate for the property conveyed, the said sum being less than the amount of unpaid costs against the orator in the chancery court; that on August 21, 1903, another execution was issued on the deficiency decree and on September 28, 1903, all lands belonging to orator was sold by the sheriff of Morgan county at public outcry and bid in by Harris for the sum of \$25, and upon application of the complainant this sale was set aside and held for naught; on the 19th day of October, 1903, another execution was sued out on the deficiency judgment levied upon the following described land (here follows a de-

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scription of the land) and sold it at public outcry to C. C. Harris for the sum of \$250; that at said sale Harris read a written statement claiming all those parts of the land previously sold under the purchases made by him at said previous sale, although the sheriff announced in calling bystanders together that he was selling 10 acres of the land and a valuable house, the said Harris claiming a part of the S. 1-2 under the deed made by sheriff in April, 1903, and claiming all that part sold under the register's deed heretofore referred to. The other facts sufficiently appear in the opinion.

CALLAHAN & HARRIS, for appellant.—Where there is no resistance to a confirmation of a sale, whatever injury may result from the sale or confirmation is attributable to want of diligence from which courts cannot relieve parties.—*Sayre v. Elyton Land Co.*, 73 Ala. 96; *Hammond v. Caillaud*, 52 Am. St. Rep. 175; *Watson v. Tromble*, 29 Am. St. Rep. 495 and note. The bill made is analogous to the disaffirmance of a sale under a mortgage and our courts have held that two years was the limit of time granted.—*Ponder v. Cheaves*, 90 Ala. 120; *Ezzel v. Watson*, 83 Ala. 120; *Pate v. Henson*, 102 Ala. 602. The criterion is laid down in the case of *Cowan v. Sapp*, 81 Ala. 527, by which laches will be determined. After confirmation a judicial sale will not be vacated except upon some special equitable ground, such as fraud, mistake, etc.—*Va. F. & M. Ins. Co. v. Cottrell*, 17 Am. St. Rep. 108; *Watson v. Tromble*, *supra*. Lands sold at the execution sale of May 28, 1903, were included in the sale of Nov. 23, 1903, and it would be futile to order a re-sale of the lands sold May 28, 1903.—*DeLoach v. Robbins*, 14 So. Rep. 777. There can be no equity in a bill which invokes the power of the court to do a vain and useless thing.—*Gardner v. Knight*, 124 Ala. 278. Before Stevenson can be heard to say that Harris is estopped from claiming the land under the first two sales on account of the sales and purchases under the last execution, he must show that he has been injured by the last sale.—*Lewis v. Ford*, 67 Ala. 142; *Adler v. Pimm*, 80 Ala. 251; *Williamson v. Jones*, 4 A. & E. Dec. in Eq. 289

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and authorities there collated. Respondents are not estopped by the record.—*Gynne v. Hamilton*, 29 Ala. 236. They are not estopped by deed.—*Edmundson v. Montague*, 14 Ala. 377; *Cooper v. Watson*, 73 Ala. 263. They are not estopped by acts in pais.—*Ware v. Cowles*, 24 Ala. 499; *Carter v. Darbey*, 15 Ala. 698; *Miller v. Hampton*, 37 Ala. 347; *Catchums v. Duncan*, 96 U. S. 666; *Brandt v. Va. C. & I. Co.*, 93 U. S. 326.

E. W. GODBY, for appellee.—Harris was estopped conclusively by the last levy, sale and purchase. The question that, at the date of the last levy and sale, Stephenson was the owner cannot be disputed.—*Thomason v. Lewis*, 15 So. 831; 103 Ala. 426; *Diall v. Gambrill*, 28 So. 1; 119 Ala. 330; *Fuller v. Eames*, 19 So. 366; 108 Ala. 464; *Klosky v. Loveman*, 12 So. 720; *Forsdick v. Risk*, 45 Am. Dec. 564; *Boylston v. Rankin*, 114 Ala. 4; 21 So. 996; *Morgan v. Donoran*, 58 Ala. 241; *Powell v. Williams*, 14 Ala. 476; *Boswell v. Carlile*, 55 Ala. 554; *Lehman Durr & Co. v. VanWinkle & Co.*, 92 Ala. 447-8; *Harden v. Collins*, 35 So. Rep. 357; *Dunlap v. Steele*, 80 Ala. 428; *Henderson v. Prestwood*, 22 So. Rep. 15; 115 Ala. 464; *Steiner v. Baker*, 19 So. 980; 113 Ala. 374.

Harris' claim at the last sale to ownership under his previous purchases debarred bidders and when taken in connection with the gross inadequacy of his bid rendered sale invalid.—*Hill v. F. & M. Nat. Bank*, 97 U. S. 450; *Ray v. Womble*, 56 Ala. 40.

ANDERSON, J.—After a sale of property under a decree of the chancery court and a confirmation of said sale, the sale will not be set aside upon a collateral proceeding unless the party seeking relief against said sale acquits himself of want of diligence in resisting confirmation. "When he will stand acquitted depends upon all the circumstances of the particular case. While the court is unwilling that its decree or process shall be employed to work illegality, injustice, or oppression, and willingly intervenes to rectify a misuse or abuse of either by restoring parties to the condition in which they were

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before the wrongs occurred, it is only the diligent they are active to serve.”—*Sayre v. Elyton Land Co.*, 73 Ala. 101; *Watson v. Tromble*, 29 Am. St. Rep. 495, and note. The bill in the case at bar does not aver any effort on the part of the complainant to resist the confirmation of the sale by the chancery court or set up any sufficient excuse for the failure to do so, and the demurrer proceeding upon this theory should have been sustained.

The bill seeks to set aside the sale made under execution of November 23, 1893, because the price was inadequate, but shows upon its face that the amount paid at said sale was not inadequate. It is true that the sale included all of the tract, but the bill shows upon its face that the most valuable part thereof had been previously sold, under the chancery sale, which had been confirmed, and there is nothing in the bill to negative the fact that the amount bid at the execution sale was less than the value of the land sold, which was not covered by the chancery sale. The demurrer in this respect should have been sustained.

It is needless to consider the validity of the sale made in May, 1903, as it would be futile to order a resale of the lands then sold, as they were included in the sale made in November, which said last sale the bill does not satisfactorily impeach. “There can be no equity in a bill which seeks to do a vain and useless thing.”—*Gardner v. Knight*, 124, Ala. 278, 27 South. 298.

We do not think that the levy and sale under the execution sale of November, 1893, divested the appellant Harris of the right and title he acquired under the chancery sale, upon the doctrine of estoppel. As a rule the levy upon and sale of property by a person estops him from denying that the other has a leviable interest therein. But we do not understand this doctrine to extend to a divestiture of rights under previous sales, made under different processes. On the other hand, a party could never increase or improve his title by purchasing at subsequent sales, without relinquishing under a former purchase, if such a contention be sound.

According to appellee’s contention the purchaser at a mortgage foreclosure sale could not sell the equity of

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redemption of the mortgagor, or purchase the same under an execution sale, without annulling his title under the foreclosure sale. In the case at bar all the land had not been sold under the first sale, and the said Harris had the right to subject the other land to the satisfaction of his execution, and the fact that it was levied upon and sold in its entirety in no way estopped him from claiming under the chancery sale so much of the land as was thereby conveyed to him under said chancery sale.

The decree of the chancellor is reversed, and a decree is here rendered sustaining the demurrer to the bill.

Reversed and rendered.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur

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Bill to Quiet Title.

(Decided June 7, 1906. 41 So. Rep. 522.)

Quieting Title; Statutory Action; Possession.—A bill to quiet title is not maintainable when the evidence discloses possessory acts on the land by defendant, the statute requiring peaceable possession in plaintiff as a condition precedent.

APPEAL from Clarke Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Action by Fannie Johnson against Edmond Johnson. From a judgment for plaintiff, defendant appeals.

The facts sufficiently appear in the opinion of the court.

WILLIAM D. DUNN, for appellant.—The purpose of the act is to aid those persons whose situation is such that they cannot test the hostile claim by direct proceedings in the usual way.—*Adler v. Sullivan*, 115 Ala. 582. It

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must be alleged that the possession is peaceable and the proof must show that the possession is such as contradistinguished from a contested, disputed or scrambling possession.—*Brand v. U. S. Car. Co.*, 128 Ala. 579; *Lyon v. Arndt*, 38 So. Rep. 242; *Ladd v. Powell*, 39 So. Rep. 46; *Randale v. Daughdril*, 39 So. Rep. 162; *Foy v. Barr*, 39 So. Rep. 578. There being no allegation of fraud testimony of fraud was inadmissible.

JOHN S. GRAHAM, for appellee.—Peaceable possession under claim of ownership is sufficient to maintain an action to determine the claim under the statute.—*Adler v. Sullivan*, 115 Ala. 582. Edmund Johnson was a mere trespasser. Attornment to one claiming adversely to his landlord does not divest the latter of possession or confer possession on the person to whom he wrongfully attorns.—*Fleming v. Moore*, 122 Ala. 399. The attornment to a stranger does not destroy the possession of the landlord.—*Campbell v. Davis*, 85 Ala. 56.

SIMPSON, J.—The bill in this case was filed by the appellee (as complainant) against the appellant (defendant), alleging that she was the owner and in peaceable possession of the lands in controversy; that her husband, now deceased, had entered the land from the United States Government; that it was all the land owned by him at his death, being 160 acres, but there is no allegation or proof as to its value; also that appellant, who is her son, claims to own said land, that no suit is pending “to force the validity of his claim,” and that the suit is brought “to settle the title to the land.” The prayer is that “the defendant be required to set forth and specify his claim, title, or interest, and show by what instrument the same is derived or created,” and that such title or interest so set up be declared to be invalid, and that complainant’s title is clear, etc. It will be seen that the bill is a proceeding entirely under the statute. Section 809 et seq., Code 1896. There are no allegations calling for an adjudication, under the general principles of the law, either for quieting title or for removing a cloud upon the title. The requirements of the statute

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are clear that, in order to maintain a suit thereunder, the complainant must be in the "peaceable possession" of the lands, and our decisions, following the language of the statute, are uniform to the effect that said possession must be peaceable, "as contradistinguished from contested, disputed, or scrambling possession."—*Lyon v. Arndt*, 142 Ala. 486, 38 South. 242; *Ladd v. Powell*, 144 Ala. 408, 39 South. 46; *Randle v. Daughdrill et al.*, 142 Ala. 490, 39 South. 162.

The evidence in this case shows acts of possession on the part of the defendant, and the fact that he has been prosecuted for trespass does not change the fact that the possession is claimed by the respondent, and that the possession of the complainant is disputed and not peaceable. We do not decide as to the effect of these acts of possession in other aspects, nor do we decide that there might not be relief under appropriate allegations for removing a cloud under general equitable principles, irrespective of the statute, but only that there is not shown that peaceable possession which the statute requires in proceedings under it. It may also be remarked that the claim of title on the part of the complainant is simply as widow of Cyrus Johnson, while the respondent is his son; and, while the testimony shows that the land was only 160 acres in area, it does not show what its value was. If it was worth more than \$2,000, the son may have had some interest in it. As both parties claim under Cyrus Johnson, we do not deem it necessary to notice that the patent offered in evidence was to Cyrus Jones. We take it for granted that this is a clerical error.

The decree of the court is reversed and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

[Central Iron & Coal Co. v. Vandenheuk.]

Central Iron & Coal Co. v. Vandenheuk.

Bill for Injunction.

(Decided April 28, 1906. 41 So. Rep. 145.)

Injunction; Continuing Trespass.—It is proper to grant an injunction to restrain the continuous throwing of rocks upon complainant's resident and grounds by blasting, though the blasting be not negligently done, and though no personal injury has resulted, the trespass being a continuing one for which the law furnishes no adequate remedy.

APPEAL from Tuscaloosa Chancery Court.

Heard before Hon. ALFRED H. BENNERS.

Bill by J. W. Vandenheuk to abate a continuing nuisance alleged to grow out of the constant throwing of rocks and other debris upon his house caused by blasting done by the respondents, the Central Iron & Coal Company. The facts sufficiently appear in the opinion of the court. From a judgment granting complainant relief this appeal was prosecuted.

HENRY A. JONES, for appellant.—For such injury as the throwing of stones on complainant's land and house causes him, he has a plain and adequate remedy at law.—*Deegan v. Neville*, 127 Ala. 471; *Kellar v. Bullington*, 101 Ala. 271; *High v. Whitfield*, 130 Ala. 444; *Jerome v. Ross*, 11 Am. Dec. 500; 1 High on Injunctions, Sect. 679; *Gauze v. Perkins*, 3 Jones Eq. (N. C.), 179; *Dennis v. M. & M. Ry. Co.*, 137 Ala. 649 (657).

The alleged act is not a continuing trespass in the sense in which that term is used in reference to enjoining trespass.—*Deegan v. Neville*, *supra*; *Hatcher v. Hampton*, 7 Ga. 49; *Elsworth v. Hails*, 33 Ark. 633. Nor has the bill equity upon the supposed ground of preventing a multiplicity of suits.—*Deegan v. Neville*, *supra*. The bill should have been dismissed because of a vari-

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ance between the allegation of the negligent blasting and the proof that it was not negligently done.

The jurisdiction of the chancery court here invoked is sparingly exercised and only in a strong and mischievous case of pressing necessity.—*Rouse & Smith v. Martin & Flowers*, 75 Ala. 510; *State v. Mayor &c. of Mobile*, 5 Porter 279; 1 High on Injunctions, Sect. 739; 2 Story's Equity, Sect. 925; *Ray v. Lynes*, 10 Ala. 63; *Keller v. Bullington*, 101 Ala. 271; High on Injunctions, Sect. 699-701.

VAUGHN & DAVIDSON and SMITH & SMITH, for appellee.—The case made by the bill and proof means either an injunction restraining the continuing nuisance or the abandonment of the home of complainant.—*People's Gas Co. v. Tyner*, 16 L. R. A. 443; 17 Am. Rep. 258; *Hayes v. Cohoes Co.*, 2 N. Y. 159; *Sullivan v. Dunham*, 47 L. R. A. 715. When a bill truly sets forth sufficient facts to entitle complainant to relief the pleader may or may not aver additional cumulative facts which only intensify without varying the principle of relief.—*Noble v. Moses Bros.*, 81 Ala. 548; 47 Ala. 104; 35 Ala. 131; 26 So. Rep. 222. The danger is such as cannot be compensated.—*Parker v. McKenna*, 10 L. R. A. 120; *Mobile Land Co. v. Gas*, 39 So. Rep. 232. The averment that the trespass was negligently done, being, as to the negligence averred, superfluous, does not require proof.—*Lanier v. Hill*, 25 Ala. 554.

ANDERSON, J.—It is an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise, it might be made destructive to their rights altogether. In the case of *Hay v. Cohoes*, 2 N. Y. 159, 51 Am. Dec. 279, where the declaration charged that by the defendant and its agents and servants, while constructing a canal on their own premises, which they had the right and authority to do, large quantities of gravel, slate, and stone were thrown upon plaintiff's lands, the court said:

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"The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher rights of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motive of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful business."—*Alfred's Case*, 9 Coke, 58. "He may excavate a canal, but he cannot cast the dirt and stone upon the lands of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages arising therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." And it would seem that one who makes a blast on his own land, and thereby causes rock to fall upon the lands of another, or upon one on the highway, is liable as a trespasser for injuries inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill.—*Sullivan, Adm'r. v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *People's Gas Co. v. Tyner* (Ind. Sup.) 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433.

It is true that the bill avers that the rocks were thrown on complainant's premises because of the negligent manner of blasting, and the undisputed evidence of respondents is that there was no negligent blasting; yet the bill avers that the rocks were constantly thrown on complainant's premises, and this fact was proven by his witnesses, and was contradicted only by circumstances and inferences. The complainant, consequently, made out a case for equitable relief, although he fails to prove that the blasting was negligently done, which was merely cumulative, and the nonexistence of which could not defeat the bill.—*Noble's Adm'r. v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175. While a complaining party cannot use a court of equity for the purpose of avoiding an action at law, which would afford

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redress, and which would doubtless give sufficient relief in a case of trespass to realty, and which involved no consideration for equitable interference, yet, if the wrong is of such a character that it makes out a case for which an action at law affords no adequate relief, a court of equity will prevent the wrong by injunction.—*Wilson v. Meyer*, 144 Ala. 402; 39 South. 317. "The chief forms in which inadequacy of the common law—the fundamental basis of all equity jurisdiction over torts—manifests itself are cases of irreparable injury, and cases of continuous or repeated nuisances involving a multiplicity of suits at law."—Pom. Equity, vol. 5, p. 514. In the case of *Rogers v. Hanfield*, 14 Daly (N. Y.) 339, it was held that an injunction was proper to prevent a party, while blasting, from hurling large quantities of loose rock upon the premises of the complainant, notwithstanding he was doing so under instructions of a city ordinance.—See, also, on this subject, *Hill v. Schneider*, (Sup.) 43 N. Y. Supp. 1; Pom. Eq. Juri. 1357.

According to the averments of the bill and the proof, the wrongs are of a continuous character, constantly interfering with the enjoyment by the complainant and his family of his premises, and which do not fall short of a nuisance, and for which the complainant can not obtain adequate redress in a court of law. The fact that none of the occupants have thus far been hurt may weaken to some extent the complainant's proof, but it does not deprive the bill of equity. The law does not consider that a man has the free enjoyment of his home, when large rocks are frequently hurled upon his house-top, in his yard, and upon his highway, simply because he has thus far escaped physical hurt. Nor does it help matters that the respondents give a warning signal before every blast, as the law does not require that it is incumbent upon a man to have to seek shelter for himself and family from a wrongful bombardment of his premises, although the aggressive party gives timely notice before committing the dangerous act. It must be also observed that if the defendants' theory is correct as to the manner of operating its quarry, and that the rock would

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not be hurled beyond its own land, then it cannot sustain any hurt or hindrance in the prosecution of its business by the decree of the chancellor, as the injunction does not restrain it from blasting, but simply from doing so in such a way as to molest the complainant.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and HARALSON, TYSON, SIMPSON, and DENSON, JJ., concur.

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Bill to Remove Cloud from Title.

(Decided May 19, 1906. 41 So. Rep. 842.)

Quieting Title; Married Woman's Deed; Remedy at Law.—A deed executed by a married woman to secure the husband's debt being absolutely void, under § 2529, Code 1896, she cannot, while out of possession, maintain a bill to remove the deed as a cloud on her title, her remedy at law being complete and adequate.—(*Armstrong v. Connor*, 86 Ala. 350, and *Landsen v. Bone*, 90 Ala. 446, explained.)

APPEAL from Coosa Chancery Court.

Heard before Hon. R. B. KELLY.

This is a bill filed by L. A. Simpson against H. A. Patterson, the nature of which is sufficiently stated in the opinion. The facts are also sufficiently stated in the opinion. From a decree for complainant the respondent appeals.

D. H. RIDDLE and J. M. CHILTON, for appellant.—The complainant was out of the possession of the land at the time of the filing of the bill and she cannot maintain the bill for removing a cloud on her title while out of possession.—*Brown v. Hunter*, 121 Ala. 210; *Wilkerson v. Wilkerson*, 129 Ala. 279; *Galloway v. Hendon*, 131 Ala. 280; *Morgan v. Lehman*, 92 Ala. 440; *Davis v. Bing-*

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ham, 111 Ala. 292. If the wife conveys her land as security for the debts of her husband, no matter what form the transaction takes, the purpose of the transaction may be shown aliunde in a court of law although it contradicts the recital of the conveyance, and she has an adequate and complete remedy at law if she is out of possession.—*Elston v. Comer*, 108 Ala. 76; *Richardson v. Stephens*, 122 Ala. 201; *Price v. Cooper*, 123 Ala. 392; *Russell v. Peavy*, 131 Ala. 563; *Gipson v. Clark*, 132 Ala. 374; *Brown v. Hunter*, *supra*. Neither can the bill be maintained under Sec. 809 of the code as the complainant is out of possession.—*Ward v. Janney*, 104 Ala. 122; *Cheney v. Nathan*, 110 Ala. 254; *Moore v. Ala. Nat. Bank*, 139 Ala. 173. The case of *Vincent v. Walker*, 86 Ala. 333 is so nearly on all-fours with this case that the attention of the court is especially called to it.

W. M. LACKEY and WHITSON & DRYER, for appellee.—While a married woman may make a conditional sale of her lands it must be a real sale, not a covert mortgage. Where the real transaction is a loan of money to be repaid, it is a mortgage.—*Peebles v. Stolla*, 57 Ala. 60. The signing of the notes for the payment of the debt of the husband does not bind her as the maker where the loan was to the husband.—*Continental Bank v. Clark*, 117 Ala. 293. Complainant can testify that she was only a surety for her husband.—*Compton v. Smith*, 120 Ala. 233; *Richardson v. Stephens*, 122 Ala. 301. Our statutes make a mortgage or deed by the wife to secure the husband's debt absolutely null and void and she may file a bill to remove a cloud on title whether in or out of possession.—*Armstrong v. Conner*, 86 Ala. 351; *Lansden v. Bone*, 90 Ala. 446. Such a conveyance being prohibited by law a purchaser from the mortgagee or grantee, although he buys in good faith and without notice will not be protected.—*Hanover Nat. Bank v. Johnson*, 90 Ala. 549; *Richardson v. Stephens*, *supra*. Such a mortgage or deed is absolutely void under the statutes, confers no right upon the grantee and cannot be set up in defense of an action of ejectment.—*Price v. Cooper*, 123 Ala. 392; *Richardson v. Stephens*, 114 Ala. 208; s. c. *su-*

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pra; *Williamson v. Regan*, 111 Ala. 621. There is no estoppel against the wife nor is she bound to pay or offer to pay money loaned as a condition pre-requisite to the maintenance of the bill.—*Heard v. Hicks*, 82 Ala. 484; *Elston v. Comer*, 108 Ala. 77, and all the authorities *supra*.

SIMPSON, J.—The bill in this case was filed by appellee (complainant), seeking to have a deed which had been executed by complainant to one J. F. Jacobs declared to be a mortgage, and to have the same delivered up and canceled, on the ground that it was merely an attempt to secure the debt of complainant's husband. Said appellant (Patterson), it is alleged, purchased the said property from said Jacobs with full notice of the true facts of the original transaction.

It appears without controversy that the complainant was not, at the time of the filing of the bill, in possession of the land in question, and the first point raised by counsel for appellant is that the complainant, not being in possession of the premises, could not maintain a bill to cancel the deed; her remedy at law being full, adequate, and complete. It is a general principle of law, so often stated as to have become a maxim, that a court of equity will not entertain a bill to remove a cloud from the title, in favor of a party who is not in possession and whose title is legal, so that he could sue in a court of law and recover the property.—*Plant v. Barclay*, 56 Ala. 561; *Daniel v. Stewart*, 55 Ala. 278; *Baines v. Barnes*, 64 Ala. 375; 4 Pomeroy's Eq. Ju. (3d Ed.) pp. 2753, 2754, § 3399, and note 1; *Brown v. Hunter*, 121 Ala. 210, 25 South. 924. In a case in which the facts were similar to those in this case this court held that the deed was void, and the married woman was allowed to recover in ejectment.—*Elston v. Comer*, 108 Ala. 76, 19 South. 324.

It is true that in the cases of *Armstrong v. Connor*, 86 Ala. 350, 5 South. 451, and *Lansden v. Bone*, 90 Ala. 446, 8 South. 65, the expression is used that in cases similar to this a married woman may maintain a bill for cancellation, whether she is in possession or not.

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It will be noticed, however, that those cases are based, without argument, on the case of *Snyder v. Glover*, 75 Ala. 379, which was a case in which only a part of the consideration consisted of the debt of the husband, which raised a very different question. But, without stopping to discuss that matter, those cases and others which followed them were based upon the married woman's law, as it stood up to the act of February 28, 1887 (Code 1896, § 2529), and the only reason given in either of them is that it was supposed that under that statute the deed or mortgage was supposed to convey the legal title in the wife. In the *Armstrong-Connor Case*, Chief Justice STONE commences the opinion by stating that "if the bill in this case had shown that complainant had a legal title to the land on which she could have sued at law, then, being out of possession, she could obtain no relief in chancery on a bill which had no other equitable aim than a removal of a cloud from her title." In a later case this court has called attention to the difference in the two statutes, stating that while, under the former statute, the conveyance carried the legal title, leaving only an equity in the wife, yet under the present statute such instruments are absolutely void, "and the invalidity can be shown at law, as well as in equity, even in defense of an action of ejectment based upon said mortgage" (*Richardson v. Stephens*, 122 Ala. 301, 306, 307, 25 South. 39); and, as the court says in a later case, "no principle is better settled than that where a contract is in violation of a statute, it is void as against public policy, incapable of ratification, and may be shown to be such in any court."—*Price v. Cooper*, 123 Ala. 392, 397, 26 South. 238. As shown by the case of *Elston v. Comer*, *supra*, it makes no difference that the deed was in the shape of an absolute conveyance; the theory being that under the statute whenever it is shown that the deed was intended as a security for the husband's debt, it is absolutely void, and the married woman can recover in ejectment on her previous title.

The remedy at law being full, complete, and adequate, it results that the bill in this case was without equity.

[Colquitt, *et al.* v. Gill, *et al.*]

The decree of the court is reversed, and a decree will be here rendered dismissing the bill for want of equity.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

Colquitt, *et al.* v. Gill, *et al.*

Bill to Remove Administration from the Probate to the Chancery Court.

(Decided July 6, 1906. 41 So. Rep. 784.)

1. *Courts; Removal of Administration from Probate to Chancery Court.*—Legatees or distributees may maintain a bill to remove the administration of the estate from the probate to the chancery court without assigning any cause, general or special, for equitable interposition, where it appears therein that the probate court has not taken jurisdiction for the special purpose of making a final settlement of the estate.
2. *Same; Allegation of Bill.*—The bill for removal need not allege that decedent was dead, or that there were assets of the estate in the county, these facts being referable to the grant of letters of administration by the probate court, to which alone § 55, Code 1896, applies.

APPEAL from Crenshaw Chancery Court.

Heard before Hon. W. L. PARKS.

This was a bill filed by E. E. Gill and others against C. C., B. F., and W. D. Colquitt, individually and as administrators of the estate of C. C. Colquitt, deceased, seeking to remove the administration from the probate court of Crenshaw county to the chancery court thereof. The bill alleges that each of complainants are over 21 years old and that they, together with the respondents, are the sole and only distributees, next of kin, and heirs at law of C. C. Colquitt, deceased; that administration upon said estate is now pending and is undetermined, and is being conducted by said administrators under let-

[Colquitt, *et al.* v. Gill, *et al.*]

ters of administration issued to them by the probate court of Crenshaw county, Ala.; that there is no proceeding now pending, and no application has been filed by the administrators or any other person for a final settlement of said administration of said estate in said probate court. Respondents move the court to dismiss the bill for want of equity, and demur to it upon the following grounds: "There is no equity in the bill. The bill does not allege when or where C. C. Colquitt departed this life. The bill does not allege that decedent departed this life seized or possessed of any property real or personal. It does not allege that decedent died leaving any assets in Crenshaw county, Ala. It does not allege that decedent left any assets at his death subject to administration. It does not allege when letters of administration were granted on the estate of decedent by the probate court. It does not allege when, where, or to whom letters of administration issued from the probate court. Its allegations are indefinite and uncertain as to whether letters of administration on the estate of decedent were sued out by J. F. Colquitt and W. D. Colquitt, or by other and different parties. The facts alleged are not sufficient to give the chancery court jurisdiction. Its allegations are too indefinite and uncertain to give this court jurisdiction of the administration of the estate of decedent. The chancellor overruled the demurrers and the motion to dismiss for want of equity, and from this decree the respondents prosecute this appeal.

C. H. ROQUEMORE and SOLLIE & KIRKLAND, for appellant. No brief came to the Reporter.

M. W. RUSHTON and BRICKEN & BRICKEN, for appellees. No brief came to the Reporter.

ANDERSON, J.—A bill may be filed in the chancery court by legatees or distributees for the removal of the administration of an estate into said court and need not assign any special or general cause for equitable interposition.—*Harland v. Person*, 93 Ala. 273, 9 South. 379;

[Colquitt, *et al.* v. Gill, *et al.*]

Cary v. Simmons, 87 Ala. 524, 6 South. 416; *Ligon v. Ligon*, 105 Ala. 460, 17 South. 89. But after the probate court has taken jurisdiction of the estate of a decedent for the special purpose of a final settlement of the pending administration there can be no removal of the administration into the chancery court, even at the instance of the legatees or distributees, unless some exclusive ground for equity cognizance is shown or unless some fact is averred because of which the powers of the probate court are inadequate and a resort to chancery is necessary.—*Ligon Case, supra*. The bill in the case at bar negatives the fact that the probate court has assumed jurisdiction for a final settlement and contains equity. It is unnecessary for the bill to aver that decedent died, or that the estate has assets in the county in which the administration is pending, as those are facts referable to the issuance of letters of administration, and not to the removal of the administration from the probate to the chancery court, and section 55 of the Code 1896, applies only to the issuance of letters of administration by the probate court. The bill sufficiently shows that it is filed by the distributees of the estate of C. C. Colquitt, deceased, against W. D. and J. F. Colquitt, the administrators of said estate, and is not uncertain or ambiguous. The chancellor properly overruled the demurrer, and the motion to dismiss for want of equity and the decree is accordingly affirmed.

*Affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

[Schloss & Kahn v. McIntyre, et al.]

Schloss & Kahn v. McIntyre, et al.

Assumpsit.

(Decided May 8, 1906. 41 So. Rep. 11.)

Officers; Contracts; Personal Liability.—Acting under the supposed authority conferred upon them by an act establishing a liquor dispensary at Ashford, Ala., (Local Acts 1900-1, p. 800) the board of dispensary commissioners purchased liquors for sale in the dispensary; the commissioners made no promise to pay for the liquors, and derived no personal benefit from their purchase; made no representations to the seller not contained in the provision of the act, which was as well known to the seller as to them; upon the act being declared unconstitutional no personal liability attached to the members of the board.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by Schloss & Kahn against J. W. McIntyre and others. From a judgment sustaining a demurer to a count of the complaint, plaintiff appeals.

This was an action to fasten an individual liability upon the commissioners of the Ashford dispensary for liquors and other things purchased for use and sale in the dispensary. The fourth count is in the following words: "Plaintiffs claim of the defendants the sum of \$514.05 for goods sold by plaintiffs to them on or about the 1st of November, 1904, under the following circumstances: The defendants were acting as a board of dispensary commissioners of Ashford, Ala., under and by virtue of the power and authority supposed to be conferred by an act of the General Assembly of Alabama approved February 6, 1901, and as such board of commissioners the defendants were operating and conducting a dispensary at Ashford, Ala., and in order to do so it was necessary to buy whiskey and other malt liquors, and as such board of commissioners defendants bought from plaintiffs said goods on and about said date, and said

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goods were received by the manager of the said Ashford dispensary, who was elected and conducting said dispensary by the directions and orders of the defendants; that said act was in fact null and void, and conferred no authority on the defendants to establish or run said dispensary; and that the defendants are liable personally for said goods so sold." There were demurrers to this count: (1) The failure to allege that the defendants have been guilty of a wrong or omission of duty, depriving plaintiffs of the benefit of the liability of defendants' principal, the Ashford dispensary; (2) the count alleges no fact showing that defendants exceeded the authority conferred by the act of the Legislature, and in such a manner or to the extent that a wrong or injury was done to the plaintiffs, or that defendants' conduct in and about the buying of said goods amounted to an omission of duty; (3) that the count shows that the plaintiffs contracted with and sold the goods to the Ashford dispensary with the knowledge that the act of the Legislature was void and conferred no authority upon the defendants; and other demurrers raising practically the same question. On a trial of the case counts 1, 2, and 3 were stricken from the complainant on motion of the plaintiffs, and the court sustained a demurrer to the fourth count of the complaint, whereupon the plaintiffs took an appeal to test the rulings on demurrer.

ESPY & FARMER, for appellants.—The act creating the Ashford dispensary is unconstitutional (Local Acts 1900-01 p. 800).—*Florence Dispensary v. Mitchell*, 134 Ala. 394; *Harland v. Clark*, 136 Ala. 153; *State ex rel Espy, et al v. Oates*, 39 So. Rep. This act being unconstitutional appellants are dealing with appellees as agents of a principal that had no legal existence. It is well established by all the laws of agency that where one undertakes to act as agent for a principal that has no legal existence the agent is bound personally under the contract.—*Codding v. Munson*, 66 Am. St. Rep. 522 and note.

REID & HILL, for appellees.—No brief came to the Reporter.

[Schloss & Kahn v. McIntyre, et al.]

WEAKLEY, C. J.—The contention of appellants is that, inasmuch as the act of 1901 purporting to establish a dispensary at Ashford (Acts 1900-01, p. 800) is, upon principles settled in *Mitchell v. State ex rel. Florence Dispensary*, 134 Ala. 394, 32 South. 687, and subsequent cases, unconstitutional, the defendants, who acted as commissioners under color of said act, and who as commissioners purchased liquors for the dispensary from appellants, are personally liable to them for the price. The only authority cited in support of the action is *Coding v. Munson*, (Neb.) 72 N. W. 846, 66 Am. St. Rep. 524, which states the general rule relied on to the effect "that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made." The opinion in that case, however, proceeds to say: "This doctrine receives its most frequent application in cases like the present, where a person or committee incurs obligations as the result of instructions given by a body gathered together informally for a special purpose, and possessing no definite membership or continued power of existence. The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that therefore it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligation, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts." It was there held that, under the facts of the case, it should have been

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submitted to the jury to determine whether the plaintiff did not look to defendant personally, but was to receive merely the subscription notes, or their proceeds, donated by those attending the public meeting. The case is not similar to this, and does not support this action. Assuming for the sake of the argument that an action in a proper case would lie against the defendants on the contract, although they made the purchases only in their official character yet, we are of the opinion that they are not individually liable for the purchases of liquor for the dispensary.

In *Smout v. Ilbery*, 10 M. & W. 1, Mr. Baron Alderson, after the examination of the authorities, said that in all the cases in which an agent has been held personally responsible "it would be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act." In *Ware v. Morgan*, 67 Ala. 461, 468, it was said by BRICKELL, C. J., upon the authority of the leading English case above cited, that the liability of the agent rests upon the fact "that he has been guilty of a wrong or omission, depriving the party dealing with him of the benefit of the liability of the principal for which he contracts." "When he is guilty of no wrong or omission, when there is a full and honest disclosure of the nature and extent of his authority, when the party dealing with him has all the knowledge and information which the agent possesses, there is no liability resting on him, though his act or contract proves to be ultra vires." Furthermore, "where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be bound is no ground for charging the agent."—1 Am. & Eng. Ency. Law (26 Ed.) p. 1127; *Humphrey v. Jones*, 71 Mo. 62; *Michael v. Jones*, 84 Mo. 578. "It is held that where the officers of a public or municipal corporation acted officially and under an innocent mistake of the law, in which the other

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contracting party equally participated, with equal opportunities for knowledge, neither party at the time looking to personal liability, the officers are not, in such case, personally liable, nor is the corporation liable."—1 Dillon on Muni. Cor. (4th Ed.) § 237, note p. 323. In *Humphrey v. Jones*, supra, the supreme court of Missouri applied the foregoing principles to defeat a suit upon a note executed by the defendant as director of a school district, acting officially under the supposed authority of a school law, although in reality under that law no such corporation as that mentioned in the note actually existed.

In this case, both parties were mistaken in supposing that the dispensary had a legal existence. It had been established under color of a statute duly enacted according to constitutional forms, although invalid because of the nature of some of its provisions, and the plaintiff had all the opportunity to know this infirmity which the defendant possessed. The defendants made no promise to pay for the liquors. It is not averred that from them they derived any personal benefit, and they neither made misrepresentations to the plaintiffs nor perpetrated any fraud upon them. The demurrer was properly sustained.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

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Assumpsit.

(Decided May 10, 1906. 41 So. Rep. 78.)

1. *Accord and Satisfaction; Part Payment; Acceptance.*—Where a claim is unliquidated, or the amount thereof is in dispute, an acceptance by the party holding the claim, of a less amount than that claimed, is an accord and satisfaction of the entire claim.
2. *Release; Contract Debt.*—Release of a simple contract debt need not be in writing, but may be by parol.

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3. *Accord and Satisfaction; Unliquidated demands; Evidence; Sufficiency.*—Testimony examined and held to uphold a finding that the claim of an attorney for services was unliquidated and the amount claimed in dispute, so that an acceptance of a less sum than the amount claimed operated as an accord and satisfaction.

APPEAL from Baldwin Circuit Court.

Heard before Hon. WILLIAM S. ANDERSON.

Action by Leslie Hall against the Hand Lumber Company. From a judgment for plaintiff, defendant appeals.

This was an action begun by appellee to recover an attorney's fee. Nearly all the facts necessary to an understanding of the case are set out in the opinion. The check and voucher referred to in the opinion are in words and figures as follows: "To cover voucher 478. Bay Minette, Ala., May 30, 1902. Baldwin County Bank, pay to the order of Leslie Hall \$30.00, thirty and no one hundred dollars. J. D. Hand." Indorsed on back of the check: "Leslie Hall." And a voucher in words and figures as follows: Voucher No. 478. Doline, Ala., May 30, 1903. Hand Lumber Co., Doline, Ala., to Leslie Hall Dr., Requisition No. ——. Bay Minette, Ala., In full of all services rendered to any or all of the following companies, viz.: Hand Lumber Company, Tug Lady Jane, Hand Export Company. Paid by check No. 76. Authorized: J. D. Hand. Approved: ——. Attested correct: G. J. S., Auditor. Received —, 190—, of Hand Lumber Co., 30 and no one hundred dollars in full of the above amount. Please date, sign, and return at once." The plaintiff testified that he received this check actually attached to the voucher. "I collected the check, and kept the voucher, and did not sign and return it. The indorsement on the check is in my handwriting." It was shown, further, that the check had been previously forwarded to the plaintiff with the voucher attached, which the plaintiff returned, declining to accept it as payment. Afterwards the check and voucher above set out were sent in place of the check and voucher returned.

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STEVENS & LYONS, for appellant.—Where a claim is unliquidated or in dispute the acceptance of a part of the claim under an agreement that the same shall be in full satisfaction of the entire claim is a satisfaction of the claim. The concession made by one is a good consideration for the concession made by the other.—*Hinson v. Todd*, 95 Ala. 329; *Baird v. U. S.*, 6 Otto, 430. *United States v. Childs*, 12 Wall. 232; *McCall v. Knavem*, 52 Miss. 494; 1 Cyc. 329, et seq.; 1 A. & E. Ency. of Law, (2nd Ed.) 419, et seq.; 6 Wait Act and Def. 410 M.

MITCHELL & TONSMIRE and GREGORY L. and H. T. SMITH, for appellees.—Before the enactment of the statute set out as Sec. 1805 of the Code of 1896, an agreement in writing or by parol to release a debt was void for want of consideration.—*Crass v. Scruggs*, 115 Ala. 258; *M. J. & K. C. R. R. Co. v. Owens*, 121 Ala. 512. It was also the law, prior to such statute, that an agreement upon payment of a part of a debt to release the balance or to forbear suit for the residue, would not be recognized as binding.—*Barron v. Vandvert*, 13 Ala. 238; *Pearson v. Thompson*, 15 Ala. 702; *Cowan v. Sapp*, 74 Ala. 50. The effect of the statute is to give effect to written receipts and releases according to the intention of the parties.—Code 1896, Sec. 1805; *Cowan v. Sapp*, 74 Ala. 508; *Cleere v. Cleere*, 82 Ala. 581; *Eufaula Nat. Bank v. Passmore*, 102 Ala. 370. The doctrine that a compromise of a doubtful claim or of a pending suit, or of a controversy when no suit has been instituted is binding, is not applicable to the facts of this case. As similar to the case at bar we call the court's attention to *Hodges v. Tenn. Implement Co.*, 123 Ala. 572.

WEAKLEY, C. J.—“The rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum without a release by deed applies only to conceded or undisputed demands. Where the claims are in dispute the compromise and part payment thereof are sufficient consideration to support the discharge.”—24 Am. & Eng. Ency. Law (2d Ed.) p. 288. The cases

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of *Barron v. Vandvert*, 13 Ala. 232, *Pearson v. Thompson*, 15 Ala. 700, 50 Am. Dec. 159, and *Hodges v. Tenn. Implement Co.*, 123 Ala. 573, 26 South. 490, each involved an indebtedness by note, and in those cases there was no dispute as to the existence of the indebtedness as evidenced by the written obligations. In each of them the holding was that on part payment of the debt, without surrender of the note, the agreement by the creditor to accept in discharge of the debt a less sum in money than the debtor owed was a nude pact, constituting no bar to a recovery of the balance. Those cases, therefore, do not at all conflict with the settled rule above announced, and which has also been thus stated: "When a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed in satisfaction operates as an accord and satisfaction, as the rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply when the plaintiff's claim is disputed or unliquidated. In such case the concession made by one is a good consideration for the concession made by the other. The fact that the creditor was not legally bound to make any abatement of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered, had he brought action, does not in any way affect the rule."—1 Cyc. 229.

It is quite true that section 1805 of the Code of 1896, declaring the effect of written releases, receipts, and discharges, has no application to this case, because the plaintiff gave no writing of the kind mentioned in that section. A release, however, at least of a simple contract debt, need not be in writing, and no set form of words is necessary. It may be by parol, may be express or implied or may result by operation of law.—24 Am. & Eng. Ency. Law (2d Ed.) 284. The dictum in *Hart v. Freeman*, 42 Ala. 567, that the Code section corresponding with section 1805 of the Code of 1896, requires settlements for the composition of debts to be in writing, was declared in *Singleton v. Thomas*, 73 Ala. 205, to be erroneous as a general proposition, although correct in the

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particular case wherein it was uttered. The questions for consideration in this case, therefore, are, first, whether the claims of the plaintiff beyond the sum paid him were conceded, or whether they were disputed or unliquidated; and, second, whether, if the latter, they were discharged by what was written and done between the parties, taken in connection with the collection by the plaintiff of the check, under the circumstances shown by the undisputed evidence.

The appellee contends that "the evidence does not show, nor tend to show, the claim of the plaintiff against defendant for services sued for in this case was ever disputed, nor that the plaintiff's claims against J. D. Hand, or Hand Export Company, or the Baldwin County Bank were ever denied," while the appellant contends just the contrary. The evidence must therefore be examined to settle this question of fact, controverted between counsel. The plaintiff's suit was first brought for \$100, and then amended so as to claim \$250, and was upon the common counts. He testified to having been employed by defendant to render legal services in three cases, but had no contract as to the amount to be paid in any of the cases, and he offered evidence of attorneys as to what was a reasonable fee in each case. He claimed, prior to collecting the check, to which we refer more fully later on, that he should be paid \$30 in the "Lady Jane Tug Case," for which item he had presented a bill at one time for \$22.50, and when the check was received there was a suit pending by the plaintiff to recover the sum of \$30 for said fee. The plaintiff testified that he had a yearly retainer from Mr. Hand of \$50 for what we may designate generally as certain small legal services, not including the services for which this suit is brought. Mr. Hand, however, testified that he had an arrangement or contract with the plaintiff whereby he was to pay him \$50 per year for whatever services he might call upon him to render for himself or his companies; and that he employed plaintiff to do whatever he was called on to do for any of the companies the witness was interested in, which were the Hand Export Company, the Hand Lumber Company, the Hand Land Company, and the

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Baldwin County Bank. It was conceded that the retainer of \$50 for the year, whatever it included, had been paid. Hand further testified that on one occasion the plaintiff told him that the cases in Baldwin county were covered by the fee, meaning the retainer, while the witness said he told plaintiff he understood the retainer to also cover the "Lady Jane tug fee." Plaintiff, according to the testimony of the witness, replied that he thought otherwise, whereupon Hand said, according to his testimony, that he would see if the captain of the tug would pay that bill. This review of the evidence has disclosed, we think, a controversy as to the amount of one item, and, further, there was serious controversy as to whether the services were not all included in the retainer, which had been paid. Nor was any item of the account liquidated.

The question of law then arises whether the receipt and collection of the check, under the circumstances shown, settled plaintiff's claim in full. A plea of release is in the record, and appellee concedes it was sufficient as a pleading to present the defense on which appellant relies. The check and voucher as first sent the plaintiff were declined, and plaintiff would not receive the check in full of the services, as stated in the face of the check and voucher. Plaintiff proposed, however, that if defendant would erase from the check the words "in full of all accounts," and return the check he would accept it as payment for his fee in the tug case. Hand did not do as plaintiff proposed, but prepared another check and voucher, under the same number, the voucher being attached to the check, and the latter on its face stating it was to cover voucher 478; that being the number of the voucher attached. From this voucher it appeared the check was given "in full of all services rendered to any or all of the following companies, namely: Hand Lumber Company, Tug Lady Jane, Hand Export Company." The plaintiff detached the voucher, collected the check, and thereupon sued the Hand Lumber Company in this action.

We cannot construe the correspondence and action of the parties otherwise than as constituting a proposal

[Odom, as Ex., v. Moore.]

to the plaintiff to pay the amount of the check in full settlement of all claims mentioned in the voucher, and as the acceptance of the proposal by the plaintiff, thereby releasing the defendant from further liability; and the plaintiff will not be heard to say he accepted it only in payment of his fee in the tug case. The plaintiff must have known the tender was made on condition, and, having accepted and collected the check was bound by the condition,—1 Cyc. 333 “While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet when made in full of the amount due and accepted, without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition that he receive it in full of his claim; but, if he accept it, he is bound by the condition, and will not be allowed to keep the money and repudiate the conditions.”—*Hanson v. Todd*, 95 Ala. 328, 10 South. 354. The plaintiff, no doubt, in the course he pursued, supposed he was safe in doing so, because a somewhat similar action was held in *Hodges v. Tenn. Implement Co.*, 123 Ala. 573, 26 South. 490, not to constitute full satisfaction of the debt; but that case involved an undisputed indebtedness and is distinguishable from this.

The defendant was entitled to the general affirmative charge, and for the refusal to give it, as requested in writing, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

Odom, as Ex., v. Moore.

Action for Attorney's Fees.

(Decided May 9, 1906. 41 So. Rep. 162.)

1. *Appeal; Rulings Favorable to Appellant; Review.*—The defendant cannot, on appeal, raise the question of the sufficiency of his plea to which the court overruled a demurrer.

[Odom, as Ex., v. Moore.]

2. *Executors and Administrators; Actions Against; Subsequent Settlement and Discharge; Effect.*—A personal representative cannot defeat a suit against her to enforce a liability against the estate, by subsequently thereto ignoring the liability, making a final settlement, surrendering the assets of the estate to the legatees or judge of probate and obtaining a discharge from the probate court finally discharging her from further liability, where it is shown that she had assets sufficient to pay all claims, including demand sued on.
3. *Same; Pleading; Pleas in Bar.*—A plea interposed by an executrix asserting that subsequent to the bringing of the action she surrendered all the assets of the estate as required by law, and was discharged from further liability, is a plea in bar of a further maintenance of the action, and not a plea in bar of the suit.
4. *Same; Actions Against; Replication; Sufficiency.*—Where defendant executrix pleaded a subsequent discharge as executrix, and a settlement of the estate, a replication alleging that the claim sued on had been duly filed in the probate court and presented to the executrix, and subsequently thereto sued on, at which time the executrix had sufficient assets to pay the indebtedness of the estate, including plaintiff's claim, and that without declaring the estate insolvent and without paying the claim, the executrix procured an order finally discharging her, was sufficient as a replication to the pleas and to justify the further maintenance of the suit and good against demurrers interposed.
5. *Appeal; Review; Questions Not Raised in Lower Court.*—Where the variance between the complaint and proof was not raised in the lower court it is not available on appeal.
6. *Same; Harmless Error; Verdict.*—The evidence warranted a finding for a larger amount than that returned by the jury, and in that state of the record it was harmless error to refuse a new trial, because the verdict was contrary to the evidence.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES A. SENN.

Action by John J. Moore against Augustine M. Odom, executrix of P. Chavagnat, deceased, for attorney's fees for services rendered deceased. From a judgment for plaintiff, defendant appeals.

The defendant, after pleading the general issue in three different forms, filed plea No. 4, as follows: "For further answer to the complaint defendant says she

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ought not to be required to further defend this cause, for that she has been discharged by the probate court of Jefferson county from her position as executrix of the estate of said Chavagnat, and is no longer the executrix of said estate, in which capacity she is sued." The plaintiff demurred to this plea, because said plea fails to allege that the defendant was discharged by the probate court from her position as executrix prior to the institution of this suit, and it appears that the defendant had been discharged since the institution of this suit and since the filing of other pleas herein, and said plea is not verified. Thereupon defendant filed plea No. 5, as follows: "Comes the defendant and says she ought not to be required to further defend this suit, for that she has been finally discharged from her position as executrix of the estate of Chavagnat by the probate court of Jefferson county; and she avers she has settled her account and delivered over the assets as required by law, which such discharge occurred since the institution of this suit; and this the defendant verifies." The plaintiff filed demurrers to this plea in all respects similar to those filed to the fourth plea, whereupon defendant filed the sixth plea, as follows: "Comes the defendant and for special plea says she ought not to be required to further defend this cause, for that heretofore, to-wit, on the 6th day of September, 1900, defendant was appointed as executrix of the estate of P. Chavagnat, and entered upon the discharge of her duties as such; that on July 13, 1901, the plaintiff filed his claim against said estate in the probate court of Jefferson county, but no order was made allowing the same; that thereafter defendant delivered and surrendered all assets in her hands as provided by law; that thereafter, on December 18, 1901, defendant filed her account for settlement of said administration, and thereupon the court made an order setting said cause for hearing on January 10, 1902, and requiring notice of such order to be posted for three weeks from December 18, 1901, as required by law; that on January 10th said hearing was continued until January 18, 1902, and, no objections being lodged against her discharge, on January 18, 1902, said probate court made

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an order forever and finally discharging defendant from all other and further liability for or on account of her execution of said will; and this defendant verifies." The plaintiff filed demurrers to this plea.

The court overruled the demurrers to the fourth, fifth, and sixth pleas, whereupon the plaintiff by way of replication joined issue on the first, second, and third plea, and "for replication to pleas Nos. 4, 5, and 6 says that on the 6th day of September defendant was appointed executrix of the estate of Chavagnat, and she entered upon the discharge of her duties as such, and that said estate was indebted to certain parties, among others the plaintiff, in the sum of \$230, which said claim against said estate was duly filed according to law in the probate court of Jefferson county, Ala.; that it was also presented to the executrix of said estate, and was on, to-wit, the 26th day of October, 1901, sued on in the city court of Birmingham, at which time the defendant was executrix of said estate and acting as such. The plaintiff further avers that all the assets of said defendant's testator which came to said defendant's hands were sufficient to pay off all of the indebtedness of said estate, including the aforesaid claim of plaintiff, and that it was the duty of said defendant as such executrix to settle said claim out of the assets of said testator. And plaintiff for further replication says that the said executrix, without declaring said estate insolvent and without paying the debt of plaintiff, procured an order of the probate court of Jefferson county on the 18th day of January, 1902, to forever and finally discharge defendant from all other and further liability for and on account of her execution of said will; that said order in no wise affected the rights of the plaintiff to have his claim paid out of the assets of said estate, and that said order was obtained voluntarily; and that there were assets in the hands of said executrix at that time more than sufficient for the payment of plaintiff's demand now declared on. And plaintiff claims of said defendant the said sum mentioned in plaintiff's complaint." The defendant filed demurrers to this replication, assigning various grounds, which demurrers were overruled by the court, whereupon

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the trial was had upon issues joined on the pleas and replication, and verdict rendered for the plaintiff in the sum of \$80. The other facts sufficiently appear in the opinion.

DENSON & ULLMAN, for appellant.—The proof shows an entirely different contract than that laid in the complaint and the proper form of action should have been a declaration setting up performance of service and the agreement to pay such sum as the plaintiff's services were reasonably worth.—2nd Chitty on Pleadings pp. 36-37. It follows that there can be no recovery in this action in the pleading.—*Davis v. Mason*, 3 Ore. 154; *Kerstetter v. Raymond*, 10 Ind. 199. There can be no recovery upon an account stated.—*Hooper v. Eiland*, 21 Ala. 714. The verdict in this case was a compromised verdict and will not be upheld.—*Adams v. Yazoo R. R. Co.*, 77 Miss. 194; *Clark v. Ford*, 62 Pac. Rep. 543.

W. F. DICKINSON, for appellee. No brief came to the Reporter.

WEAKLEY, C. J.—The court below overruled the plaintiff's demurrers to pleas 5 and 6, and thereupon the plaintiff filed a special replication to these pleas. The facts of the case, out of which arises the main question of law presented for decision, are fully presented by the pleas and replication, taken together. Those facts are that, after suit duly brought by the plaintiff against the defendant as executrix upon a claim which had been properly presented, the executrix, having received assets sufficient to pay off all the indebtedness of the estate, including that due the plaintiff, and without declaring the estate insolvent or paying the plaintiff's debt, filed her accounts for a settlement of the administration and procured an order from the probate court finally discharging her from further liability for or on account of her execution of the will; there being at the time she voluntarily obtained the order assets in her hands more than sufficient for the payment of plaintiff's demand. The plea alleges that the defendant had "delivered and sur-

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rendered all assets in her hands as provided by law," which means, no doubt, that she had delivered the assets to the legatees, or to the probate judge for them. The pleas do not allege a resignation by the defendant, and are somewhat meager and obscure; but as the court overruled the demurrer to the pleas, no question as to their legal sufficiency arises on this appeal, taken by the defendant.

Treating them as sufficient, the question is whether the replication constituted an answer to them. Upon the principles declared and the reasoning employed in *Whitfield v. Woolf*, 51 Ala. 202, it must be held that the administratrix could not defeat the suit by ignoring the existence of the plaintiff's demand, making final settlement, surrendering the assets either to the legatees or the probate judge, and obtaining a discharge from the probate court. If such action upon the part of a personal representative, administering a solvent estate, could defeat pending suits, creditors would, indeed, be in a sorry plight. The discharge of the executrix by the probate court from further liability cannot affect the plaintiff. The liability to him could not have been enforced in the probate court, since his claim was not in litigation in that court, and could not have been drawn within its jurisdiction without a report of insolvency. The replication was a complete answer to the pleas, and was no departure from the cause of action set up in the complaint. The pleas were not in bar of the suit, but in bar of its further maintenance; and the facts alleged in the replication were designed to defeat the pleas and to justify the further maintenance of the suit and to justify the further maintenance of the suit for a recovery by the plaintiff upon the very cause of action in the complaint alleged. This was permissible and proper practice.—*Whitfield v. Woolf*, *supra*; *Draper v. Walker*, 98 Ala. 310, 314, 13 South. 595. The demurrer to the replication was properly overruled.

Upon the contention of appellant that there was a variance between the case alleged in the complaint and that made by the proof, it suffices to say that no charge was asked or objection made in the court below present-

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ing the question of variance; and hence we are not called upon to express an opinion in reference to this question. There was abundant evidence to support the verdict. Indeed, the jury, upon the evidence, might have allowed a larger sum than they did allow. This court will not reverse the action of the lower court, refusing a new trial, in this state of the evidence.—*Terrell Coal Co. v. Lacey*, (Ala.) 31 South. 109.

No error appearing in the record, the judgment is affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

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Action for Breach of Contract of Sale.

(Decided June 7, 1906. 42 So. Rep. 67.)

1. *Sales; Contract; Breach; Action; Complaint.*—The complaint having alleged defendant's refusal to deliver the cotton contracted for, and plaintiff's readiness and willingness to receive and pay for same, *ex vi termini*, these allegations import a demand for delivery and a refusal, and the complaint was not subject to demurrer for failing to allege a demand and refusal.
2. *Same; Offer and Acceptance.*—An offer of sale of personal property, when made, is deemed to continue in force until refused or accepted, unless withdrawn before acceptance, and if this is relied on, it is a matter to be specially set up as a defense, and the complaint need not negative its withdrawal before acceptance.
3. *Same; Acceptance by Telegram.*—Defendant (appellant) directed plaintiff's buyer and agent to offer plaintiff a certain amount of cotton at a certain price, which was done, and plaintiff (appellee) filed with the telegraph company an acceptance immediately and before being notified of a withdrawal of the offer; Held, to constitute a sufficient acceptance to form a contract of sale.
4. *Principal and Agent; Offer and Acceptance.*—Appellants requested appellee's agent and buyer to communicate to appellees

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an offer of certain cotton at a specified price; Held, this constituted appellee's buyer appellant's agent to make the offer and receive acceptance, so that an acceptance of the offer made known to the agent was binding on the appellants without their having actual notice thereof.

5. *Pleading; Demurrer to Complaint.*—It is proper to overrule a demurrer addressed to a part of a count; a demurrer must go to the whole count to be available.
6. *Appeal; Record; Exceptions; Review.*—Motion to strike and the court's action thereon must be shown by the bill of exceptions, as must the exception thereto, and not on the record proper, before this court will review such action of the trial court.
7. *Trial; Objection to Evidence; Sufficiency.*—Where the interrogatories are not numbered in the record, and objection is made the answer of a witness "to the 9th and 10th district interrogatory, to each separately and to each separate statement contained in the answers," because the same are illegal, irrelevant and immaterial, this court cannot know to what the exception goes, and moreover the objectionable answers, or parts thereof, should have been specifically pointed out by the objection.
8. *Evidence; Best Evidence.*—It is permissible to permit a witness to state the meaning of the cypher words used in the telegram, if he knew them, without producing the cypher code or key.
9. *Sales; Breach of Contract; Damages.*—If there was no cotton market for the purchase of cotton similar to that offered and accepted, at the place of the offer and acceptance, the damages for the breach of the contract of sale was the difference in the price at which the cotton was offered and accepted and the price plaintiffs (appellees) would have to pay for the same quality and quantity of cotton at the nearest available market where it could be obtained.
10. *Same; Offer and Acceptance; New Terms.*—The use of the words, "ship promptly" in the telegram of acceptance, meaning within a reasonable time, cannot be construed as adding any new or additional terms to the contract, but are mere shipping directions.
11. *Trial; Affirmative Charge.*—The making and breach of the contract being indisputably established by evidence without adverse inference, the plaintiff was entitled to nominal damages and to the affirmative charge, and it was harmless error to refuse defendants requested instructions.
12. *Same; Instructions.*—A charge that if the jury did not believe the evidence they must find for the defendant was bad and properly refused.

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APPEAL from Marshall Circuit Court.

Heard before HON. W. W. HARALSON.

Action by the Howell Cotton Company against McCleskey & Whitman. From a judgment for plaintiff, defendant appeals.

This is an action to recover damages for the breach of an executory contract. The complaint is in the following language: "Count 1. The plaintiff claims of the defendants \$250 as damages for the breach of a contract for the sale of 200 bales of cotton by defendants to plaintiff on the-----day of January, 1904, by which defendants offered to sell to plaintiff 200 bales of cotton at 13 1-4 cents per pound, which offer was duly accepted by plaintiff on the day it was made, and after its acceptance the defendants refused to deliver said cotton to plaintiff and plaintiff was ready and willing to pay for said cotton on delivery. Count 2. Plaintiff claims of the defendant the further sum of \$250 as damages for the failure by defendants to deliver to plaintiff 200 bales of cotton, which cotton defendants offered to sell plaintiff on the -----day of January, 1904, and plaintiff accepted said offer on said bales and so notified defendants, and were ready to pay for said cotton on delivery to them, but the defendants refused to deliver said cotton to plaintiff to its damage as above set out. Count 3. Plaintiff claims of the defendants the further sum of \$250 as damages for the failure and refusal of defendants to deliver to plaintiff 200 bales of cotton, which defendant on the-----day of January, 1904, offered for sale to plaintiff, through one J. B. Marsh, plaintiff's agent, at 13 1-4 cents per pound, who telegraphed said offer at defendants' instance to plaintiff, at Rome, Ga., who thereupon and on said day, telegraphed said J. B. Marsh accepting defendants' offer of said cotton, which was duly communicated to defendants, who thereupon failed and refused to deliver said 200 bales of cotton to plaintiff who was ready and willing to pay the purchase price agreed upon. Count 4. Plaintiff claims of the defendants the further sum of \$250 as damages for that heretofore, to-wit, on the-----day of January, 1904, the defendants, who were merchants doing business in

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Boaz, Ala., authorized one J. B. Marsh, who was plaintiff's agent, to telegraph plaintiff who was doing business in Rome, Ga., offering them 200 bales of cotton at 13 1-4 cents per pound, which the said Marsh did. After said offer had been made by telegraph, but before said Marsh or defendants had been notified of its acceptance, the defendants notified said Marsh to telegraph plaintiff withdrawing their offer to plaintiff, which he immediately did; but before said telegram reached plaintiff in the usual course of business, they had telegraphed to said Marsh accepting defendants' offer on said 200 bales of cotton, and said Marsh immediately notified defendants of said telegram of acceptance, and thereupon they refused to deliver said cotton which plaintiff was ready and willing to pay for at the agreed price. Plaintiff on said day sold said cotton, and when notified that defendants refused to deliver the same, they went into the market and purchased 200 bales of cotton to fill their said contract at the market value which was 1-4 of a cent per pound more than they agreed to pay defendant for said cotton, amounting to \$250, which amount plaintiff was damaged, and hence sues to recover." Defendant interposed the following demurrers to count 1: "(1) Because it is not averred that said offer to sell was accepted while said offer was pending. (2) Because it is not averred that the defendant agreed to sell and plaintiffs to buy said cotton at the same moment. (3) Because the time of delivery is not averred. (4) Because the place of delivery is not averred. (5) Because the time and place of demand for delivery is not averred. (6) Because the weight of the bales of cotton offered is not averred. (7) Because it is not averred that the plaintiff demanded the delivery of said cotton. (8) Because the date of said alleged transaction is not averred." The grounds of demurrer assigned to count 1 were separately assigned to count 2. The grounds of demurrer assigned to counts 1 and 2 were separately assigned to count 3, with the following additional grounds: "(9) Because the averment that plaintiff's telegram to Marsh was duly communicated to defendants is the averment of a conclusion. (10) Be-

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cause it is not averred when plaintiff's telegram to Marsh was communicated to defendants. (11) Because it is not averred that defendants' offer was still open when plaintiff's acceptance was communicated to defendants. (12) Because the count fails to show that there was a meeting of the minds of the parties upon a contract to sell the cotton." The grounds of demurrer separately assigned to counts 1, 2, and 3 were assigned to count 4 with the following additional grounds: "(13) Because said count shows that the offer to sell was withdrawn by defendants before acceptance by plaintiff. (14) Because the offer to sell was withdrawn by defendants before plaintiff notified defendants of their acceptance thereof. (15) Because the option was revocable by defendants at pleasure, and was revoked before acceptance. (16) Because it is shown that Marsh, plaintiff's agent, was notified of the withdrawal of the offer to sell before acceptance thereof by plaintiff. (17) Because it is shown that there was in fact no contract for the sale of said cotton. (18) Because it is shown that there was no meeting of the minds of the parties upon the offer to sell at the same moment of time. (19) Because the measure of damages claimed is not a proper measure. (20) Because it is not averred into what market plaintiff went and purchased said cotton. (21) Because the proper measure of damages is in the agreed price and the market price at the agreed time and place of delivery."

These demurrers were overruled. The judgment entry shows after the overruling of the demurrers "thereupon the defendants moved the court to strike from the fourth count of the complaint the statement of plaintiff's damages, the same being submitted to the court for consideration, and after due consideration thereof it is considered by the court that the same be, and is hereby, overruled." The motion is not shown in the record or in the bill of exceptions. The other facts sufficiently appear in the opinion. The court gave the general affirmative charge to the plaintiff, and refused a like charge to the defendants. The defendants requested the

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following written charge which was refused. "(2) If the jury do not believe the evidence, they will find for the defendant."

STREET & ISBEL, for appellant. No brief came to the Reporter.

HOWARD & HUNT, for appellee. No brief came to the Reporter.

TYSON, J.—This action is for the recovery of damages for breach of an executory contract entered into by and between plaintiff and defendants whereby the latter agreed to sell and deliver to the former 200 bales of cotton at an agreed price per pound. The complaint contains 4 counts.

A number of grounds of demurrer were interposed to each of them. The first of these insisted on is, that there is no averment of demand by plaintiff upon defendants to deliver the cotton. Each of the counts contain an averment of the refusal of the defendants to deliver the cotton and a readiness and willingness on the part of the plaintiff to pay for it on delivery. If it be conceded that an averment of a demand is necessary, a refusal, *ex vi termini*, imports that a demand was made. The insistence is without merit.—*Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254; *Peoples B. L. & S. Association v. Reynolds*, 17 Ind. App. 453, 46 N. E. 1008; *Fletcher v. Cummings*, 33 Neb. 793, 51 N. W. 144; *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579; *Berney v. Drexel* 33 Hun (N. Y.) 34; *Ind. Mfg. Co. v. Porter*, 75 Ind. 428.

It is next insisted that the complaint should show that the offer was pending at the time of its acceptance by plaintiff. An offer is "deemed to continue in force until it has been answered, although it may be withdrawn at any time before it has been accepted unconditionally, but not afterwards."—7 Am. & Eng. Ency. Law (2d Ed.) 128 and cases cited in notes. See also, *Mactier's Adm'rs v. Erith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262. If defendants relied upon a withdrawal of their offer before acceptance by plaintiff, this is a matter of defense.

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On the averments of counts 3 and 4 Marsh was defendants' agent to communicate their offer and to receive plaintiff's acceptance of it, without defendants actually receiving notice of it.—9 Cyc. p. 273. It is true, defendants could have withdrawn their offer at any time before acceptance was communicated to their agent Marsh, but the telegram of plaintiff's to Marsh when delivered to the telegraph company was a sufficient manifestation of acceptance, which was done before plaintiff was notified of the withdrawal of defendants' offer.—9 Cyc.pp. 293, 294, 295, 296; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511, and cases there cited.

The application of these principles to the averments of these counts will suffice to show their sufficiency as against the contention that no binding acceptance by plaintiff of defendants' offer is shown.

A demurrer should be addressed to the whole of the count, and not to a portion of it. That ground of demurrer attacking that part of count four (4) which relates to the damages claimed for a breach of the contract, alleged, upon the ground that damages claimed are not such as the law permits a recovery for, consequent upon a breach of contract was, therefore, properly overruled. If a motion was made to strike this part of the count, it does not appear in the bill of exceptions, nor was an exception to the ruling of the court in denying the motion, which is shown only by the minute entry, shown to have been reserved by the bill of exceptions. This ruling, therefore, is not revisable.

The only possible objection that can be urged against the sufficiency of the statement of the damages sought to be recovered is its failure to show in what market plaintiff purchased the cotton to take the place of the cotton that defendants agreed to sell it. The rule seems to be that the measure of such damages, if there was no market for the purchase of the cotton at the place where defendants were to deliver the cotton they agreed to sell, is the difference in the price plaintiff would have to pay for the same quantity and quality of cotton at the nearest available market where it could be obtained.—*Mc-*

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Fadden v. Henderson, 128 Ala. 221, 29 South. 640. From the language employed in the count an inference is afforded that plaintiff did purchase the cotton in the market of Boaz, the place where defendants were to deliver what they agreed to sell. We do not, however, mean to be understood as holding that mere inferences in pleading are sufficient as against an attack by demurrer in a case where a demurrer can be availably interposed.

The interrogatories propounded to witness King are not numbered in the record. The objection interposed was to "his answers to the ninth and tenth direct interrogatories, to each separately, and to each separate statement contained in said answers, on the ground that the same were illegal, irrelevant and immaterial." On this state of the record it would, to some extent, be guesswork on our part to undertake to review the ruling of the court in overruling them. But be this as it may, if the object sought to be accomplished by the objection as shown by brief of appellant's counsel was to exclude King's testimony, some of which tended to establish the damages suffered by plaintiff as claimed in the fourth count of the complaint, the objection was properly overruled. Moreover, the objectionable answers, if any there were, should have been specifically pointed out in the objection. There was clearly no error in permitting witness Marsh to testify to the meaning of the "cypher words" used in the several telegrams. If he knew their meaning it was not necessary to produce the key. The words "ship promptly" contained in the telegram of acceptance sent by plaintiff to Marsh was clearly a mere direction to him as their agent, and cannot be construed as adding a new term to defendants' offer. This, it seems to us, is apparent when we bear in mind that reference is also made in the telegram to 75 bales of cotton located at another point. Besides, the word "promptly" as here used, means nothing more nor less than reasonable time—the latter term being a relative one, and its meaning dependent upon the circumstances.—23 Am. & Eng. Ency. Law (2d Ed.) p. 971.

It is entirely clear that the telegram replying to de-

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fendants' offer, made through Marsh, was an acceptance and not a mere authorization to Marsh to accept. It was a positive order to him to take defendants' cotton at the price named in their offer of sale.

The allegations of the fourth count as to a breach of the contract having been undisputedly, and without adverse inference, established by the testimony, the affirmative charge requested by plaintiff was correctly given. This being true, the plaintiff was certainly entitled to recover at least nominal damages. What we have said also disposes of the assignments of error predicated upon the refusal by the court of all the charges requested by defendants adversely to them, except the one numbered 2. That charge was properly refused on what was said of a similar one in *Koch v. State*, 115 Ala. 99, 105, 22 South 471. The reason assigned for the refusal of this class of charges is so obviously applicable to this case that we need not pointedly apply it.

We have considered every insistence laid in brief of appellant's counsel, and find no error in the record.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Action on Common Counts.

(Decided May 29, 1906. 41 So. Rep. 806.)

1. *Appeal; Review; Harmless Error; Ruling on Demurrer.*—Where demurrers to certain pleas were overruled, and these pleas were afterwards withdrawn, the court's action on the demurrers will not be reviewed on appeal.
2. *Evidence; Written Contracts; Variance by Parol.*—It is not offending the rule against varying written contracts by parol to permit evidence to be introduced to show that two written contracts in evidence related to one and the same transaction and were, in effect, but one contract.

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3. *Sales; Severability of Contract.*—The defendant ordered one car of sash, with the privilege of three cars at certain per cent off list price, specifications for the first car to be furnished within twenty days, and if others are taken, all to be furnished by April 1st after date of order; Held, such contract was severable, and that plaintiff was liable for failure to furnish other cars, although defendant did not furnish specifications for first car in time limit, for which defendant was liable.
4. *Same.*—Where the buyer was to pay for goods in installments, and the goods were to be delivered in installments, such contract is severable, and in default of either party in one of the installments will not ordinarily entitle the other to abrogate the contract entirely.

APPEAL from Birmingham City Court.

Heard before Hon. Charles W. Ferguson.

This was an action on the common counts. The defendant filed the general issue and pleas 3, 4, and 5. Pleas 2, 6, 7, and 8 were withdrawn. Plea 3: "And for further plea in this behalf, and by way of set-off, the defendant says that the plaintiff is indebted to the defendant in a large sum, to-wit, \$300, which sum defendant claims of the plaintiff as damages for the breach of a certain contract made between plaintiff and defendant on the 29th day of November, 1900, whereby the plaintiff undertook and agreed to sell and deliver to defendant for an agreed price one car of sash, with privilege to defendant to take three cars of sash at the same price per car. And defendant says that plaintiff broke its said contract and failed and refused, without just cause or legal excuse, to furnish and deliver said one car of sash, and that by the plaintiff's said breach of said contract the defendant was greatly damaged, and lost the profits it could and would have made upon said car of sash, and defendant was compelled to buy other sash at a greater price than plaintiff had bound itself by said contract to deliver said cars of sash for, and all to the damage of defendant in the sum of \$300; and defendant offers to set off its said demand and claim against that of the plaintiff mentioned in the complaint and the several counts thereof." This plea was amended by striking therefrom the words, "and lost the profits it could and

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would have made upon said car of sash," where they appear in said plea, and by adding next after the words "a greater price" the words "to wit, \$300." Plea 4: "And for further plea in said behalf, and by way of set-off against plaintiff's demand, the defendant says that the plaintiff is indebted to the defendant in a large sum, to-wit, \$700, which sum defendant claims of the plaintiff as damages for the breach of a contract made on November 29, 1900, between plaintiff and defendant, whereby the plaintiff agreed for a valuable consideration to sell and deliver to defendant, free on board cars at Rock Island, Ill., and less freight to Birmingham, one car of knock-down sash, with the privilege of three cars of sash, and, if defendant should elect to take the two last-named cars of sash, they were to be furnished by April 1, 1901, by plaintiff at the same price per car which was agreed on for the said first car; and the defendant says that the plaintiff broke its said contract in this: That, although defendant furnished the plaintiff specifications for said two cars of sash prior to April 1, 1901, the plaintiff failed and refused on demand to furnish and deliver to defendant two cars of sash on or prior to April 1, 1901, as plaintiff had agreed to do; and defendant says that it has been greatly damaged by plaintiff's said breach of contract, and had to purchase other sash at a higher price, to wit, \$700, than plaintiff had agreed as aforesaid to furnish said sash for, and otherwise was greatly damaged by plaintiff's said breach of contract, and all to the damage of defendant in the sum of \$700, which defendant offers to set off against plaintiff's claim in said cause, and defendant claims judgment for the excess." Plea 5: "And for a further plea in this behalf defendant says that heretofore, to wit, on the 29th of November, 1900, the defendant purchased from the plaintiff, through its agent, certain doors and blinds and sash, known as 'K. D., or knock-down, sash'; that the doors and blinds were entered upon one order, and the K. D. sash was entered upon another order, and the two orders formed one and the same transaction with the said agent of plaintiff; that in and by the said order for K. D. sash the defendant gave an order for one car of K. D.

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sash, with privilege of three, and specifications for the last two of said cars of K. D. sash referred to in said order were, if taken, to be furnished by April 1, 1901, and the defendant says that the plaintiff shipped to the defendant the said cars of doors and blinds, but wrongfully refused and failed to ship either of the two last-named cars referred to in the order as 'K. D. sash'; and that by said failure and refusal of the plaintiff to ship said two cars of K. D. sash referred to in said order defendant was greatly damaged, and defendant lost the difference in price between what plaintiff had agreed to sell said sash for and what they were worth at the time and place of delivery, to-wit, \$1,000, was put to expense in and about purchasing other cars of K. D. sash from other vendors thereof, and had to pay a greatly increased price for the cars of K. D. sash which it bought to take the place of those which it had contracted to buy from plaintiff as aforesaid, to wit, \$1,000, and was otherwise put to great expense and damage in and about and by reason of plaintiff's said breach of its said contract, all to the damage of defendant in the sum of \$1,000. And defendant hereby offers to recoup its said damages against plaintiff's said claim and claims judgment for the excess."

The plaintiff filed 43 grounds of demurrer to these pleas, but the main questions raised by the demurrers are as follows: (1) The pleas purport to declare on an express executory contract, but do not set out said contract fully in words and figures. (2) While declaring on an express executory contract, the pleas do not set out and aver the substance of said contract with precision and certainty. (3) They do not set out all the facts, terms, and conditions constituting said contract. (4) It does not set out with sufficient certainty the consideration for the contract. (5) They do not aver with sufficient precision or certainty the substance of the breach of the contract by plaintiff. (6) There is not averred with precision and certainty the time, manner, and place of payment of the consideration, to whom the payment was to be made, and whether it was payable in cash or not. (7) They do not aver the price per car of the goods

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and chattels alleged to have been purchased under the contract. (8) It fails to aver or set out whether or not there was any limitation of time upon the privilege of the defendant to take more than one car of sash, and, if there was a limitation, the time of the limitation. (9) The failure to aver all the facts and circumstances under which the contract was made. (10) The damages claimed were speculative, conjectural, and remote. (11) That the profits claimed as damages were constituent elements of the contract, and that the loss of the same was a natural result of its breach. That pleas 3 and 4 were repugnant and incompatible with the other pleas. (12) That pleas 3 and 4 were pleas of set-off, and the other pleas were pleas of recoupment. (13) That they do not aver that at the time the contract was made the defendant had an existing contract for resale of the knock-down sash, and the plaintiff knew or was informed of the contract of resale. (14) That the pleas do not confess and avoid the allegations of the complaint, nor traverse the same. (15) It does not appear that the contract for the doors and blinds was a separate and independent contract from the written contract of the purchaser of knock-down sash; and it further appears that said contracts cannot be connected with each other, so as to form one written contract, without the aid or assistance of the introduction of oral testimony, which cannot be introduced to vary the terms of a written contract.

There were a great many charges requested, some of which were given and some refused to both plaintiff and defendant; but, as they are not noticed in the opinion, they will not be set out.

BROWN & MURPHY and S. M. C. AMASON, for appellant.—The court erred in not sustaining demurrers 1 to 40 filed to the special pleas in this cause.—*Manier v. Appling*, 112 Ala. 663; *Powell v. Crawford*, 110 Ala. 294; *Lawton v. Rickets*, 104 Ala. 430; *O'Brien v. Pipe-works*, 93 Ala. 582; *Brigham v. Carlisle*, 78 Ala. 243; *Jeffries v. Castleman*, 68 Ala. 432. The court erred in not excluding the testimony as to the conversation and

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parol communications concerning the written orders which varied the terms of the said written instrument.—*Forbes v. Taylor*, 35 So. Rep. 855; *Seymour v. Farquhar*, 93 Ala. 292; *Dexter v. Ohlander*, 89 Ala. 262. Where the authority of an agent is in writing and his contract is also in writing a party dealing with the agent is charged with knowledge of the writing and the principal is not bound by any act of the agent in excess of the written authority.—*Cummings v. Beaumont*, 68 Ala. 204; *Deering v. Lightfoot*, 16 Ala. 628; 2 A. & E. Ency. of Law, 1001; *Kidd v. Cromwell*, 17 Ala. 648. The contract was not severable but was single and entire.—7 A. & E. Ency. of Law, 96; *McFadden v. Henderson*, 128 Ala. 221; *Thornton v. Railroad*, 84 Ala. 109; *Batre v. Simpson*, 4 Ala. 305; *Johnson v. Jemston*, 78 Ala. 378; *Nesbit v. Drew*, 17 Ala. 479; *Fullenwider v. Rowan*, 136 Ala. 287.

WALKER, TILLMAN, CAMPBELL & WALKER, for appellee.—The contract was clearly severable.—*Gerli v. Silk Mfg. Co.*, 30 L. R. A. 61; *Johnson v. Allen*, 78 Ala. 391; *Rugg v. Moore*, 1 Atl. Rep. 320; *Osgood v. Bauber*, 1 L. R. A. 655; *Semmes v. Brewing Co.*, 132 Ala. 311.

To the same effect is *Gomer v. McPhee*, 31 Pac. R. 119; *Hausen v. Consumers Co.*, 73 Iowa, 77; *Meyer v. Wheeler*, 65 Iowa, 390; *Cannon Coal Co. v. Taggart*, 1 Col. Ap. 60; *Tucker v. Billing*, 5 Pac. R. 553; *McGrath v. Cannon*, 57 N. W. 150; *Otis v. Adams*, 56 N. J. L. 38; *Tucesco Oil Co. v. Brewer*, 66 Pa. 351; *Gill v. Lumber Co.*, 25 Atl. 120.

DOWDELL, J.—To the complaint, which was on the common counts, the defendant filed pleas numbered from 1 to 8 inclusive; the first being the general issue and the rest special pleas. Subsequently the third and fourth were amended, and the second, sixth, seventh, and eighth were withdrawn. By the third and fourth pleas set-off was pleaded as a defense. By the fifth plea recoupment was intended to be pleaded, and, indeed, was so treated by the parties; but it is not shown by the averments in the plea that the damages sought to be re-

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couped arose out of the transaction on which the suit was brought or the complaint was based. Demurrers were interposed to these pleas, but we think they were unobjectionable on any of the grounds assigned. There were replications, rejoinders, and surrejoinders, to which demurrers were interposed, and upon which rulings were had, but which we need not consider, since the pleas that these replications, rejoinders, and surrejoinders relate to were subsequently withdrawn.

It is stated by counsel on both sides in their briefs that the main issue in the case hinges upon the construction of what is designated in the record as "Order No. 8,489," which is as follows: "Birmingham, Ala., November 29th, 1900. Order No. 8,489. Rock Island Sash & Door Co., Rock Island, Ill.—Gentlemen: Please enter our order for one car K. D. sash, with privilege of three, at 78 per cent. off the list, specifications first car to be furnished within twenty days, and, if others are taken, both to be furnished by April 1st. Price f. o. b. Rock Island, freight allowed to Birmingham. Yours truly, Moore & Handley Hardware Co." The contention of appellee, defendant in the court below, was and now is that said order formed part of the contract, the foundation of the plaintiff's suit; the said complaint while on the common counts, being for a balance due on a contract of purchase by the defendants from the plaintiff of a car of doors and blinds, and which contract, while a single and entire transaction, was for the convenience of the parties put in the form of two orders, numbered, respectively, 8,488 and 8,489, the first relating to the doors and blinds, and the latter to the K. D. sash. There was the further contention by appellee that the part of said contract designated as "Order No. 8,489," above set out, was as to the three cars of K. D. sash severable. The contention of the appellant was, and is now, that order No. 8,489 was a separate and distinct contract from the contract for the purchase of the doors and blinds, and, furthermore, was in itself entire and inadmissible.

On the trial the evidence on the part of the defendant tended to show that there was but one contract, and that the two orders constituted a single transaction, and were

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put in two forms for convenience of the parties. The evidence of the plaintiff, on the other hand, tended to show that the two orders were wholly separate and distinct transactions; the one having no connection with or reference to the other. The plaintiff objected to the introduction of this evidence, when offered by the defendant, on the ground, that it was an effort to vary a written contract by parol evidence. Where there are two written contracts, it is competent to show by parol evidence that they relate to one and the same transaction and constitute one contract, without offending the rule against varying a written contract by parol evidence.—1 Greenleaf on Ev. (16th Ed.) § 283. Order No. 8,489, set out above, whether taken by itself or in connection with the evidence, we think, shows a severable contract. The goods were to be delivered in installments, and the price was proportioned to and payable on the several installments. The order was for one car, with privilege of three. The option to take belonged to the purchaser. The failure or refusal of the purchaser to furnish the specifications on the first car within the time limit, or, for that matter, the failure or refusal of the purchaser to take the first car, did not furnish the plaintiff with the right to abrogate the entire contract. It would have had its remedy against the defendant for damages for any failure or refusal on the part of the defendant to accept the first car. In other words, the defendant could not have escaped liability for a breach of the contract growing out of a failure on their part to furnish specifications on the first car within the time limit.

The principle governing such contracts is thus stated by the New Jersey court in *Gerli v. Silk Mfg. Co.*, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611: "When the seller of goods has agreed to deliver them in installments, and the buyer has agreed to pay the price in installments, which are proportioned and payable on the delivery of each installment of goods, default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract." As said in *Johnson v. Allen*, 78 Ala. 391, 56 Am.

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Rep. 34: "Each delivery is considered in the nature of a separate and distinct contract." In *Rugg v. Moore* (Pa.) 1 Atl. 320, it is held that an agreement for sale of six loads of corn, delivered at different times and payable at a price per bushel on delivery, is a severable contract. In *Osgood v. Bauder*, (Iowa) 39 N. W. 887, 1 L. R. A. 655, which seems to be a case in point, there was a contract by a traveling salesman of a coal company for the sale and delivery of 150 cars of Scranton coal at a certain price, shipped as ordered during August and September, and with the privilege of 250 cars more at same price and upon same terms. The buyer ordered 400 car loads before the end of September, but the seller failed to furnish 290 of the cars ordered. After the agreement was made the price of coal advanced, and, when the coal company sued the buyer for the purchase price of the coal actually delivered, the defendant demanded that the damages sustained by reason of the failure of the coal company to fill its orders be treated as a counterclaim to any claim held by the plaintiff. The court said: "But the agreement must of necessity be considered as several, for the reason that it consisted of two parts, one of which was, in effect, a contract of purchase and the other a contract for the privilege of purchasing. We shall therefore treat so much of the contract as relates to the 250 car loads of coal as separate and distinct from the remainder. * * * A right to rescind a contract for a certain amount of coal to be shipped in quantities as ordered, payment to be made for each shipment a certain number of days after shipment is made, is not given by a failure to pay for certain shipments within the time specified, as such failure does not go to the whole contract." In *Sims v. Brewing Co.*, 132 Ala. 311, 31 South. 35, it was held that if a part of a contract to be performed by one party consists of separate items, and the price to be paid is apportioned to each, the contract is severable. The following cases are to the same effect: *Gomer v. McPhee*, (Colo. App.) 31 Pac. 119; *Hausen v. Consumers Co.*, 73 Iowa, 77, 34 N. W. 495; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac.

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238; *Tucker v. Billing*, (Utah) 5 Pac. 554; *McGrath v. Cannon*, (Minn.) 57 N. W. 150; *Otis v. Adams*, 56 N. J. Law 38, 27 Atl. 1092; *Lcesco Oil Co. v. Brewer*, 66 Pa. 351; *Gill v. Lumber Co.*, (Pa.) 25 Atl. 120.

Applying the foregoing principles to the undisputed facts in the case, we fail to find that any error has been committed, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

Hendricks v. Clemmons.

Action on Common Counts for Services of Minor Son.

(Decided May 19, 1906. 41 So. Rep. 306.)

1. *Landlord and Tenant; Cropping Contract; Tenancy in Common.*—Where one party furnishes the land and team with which to cultivate it and the other party furnishes the labor necessary to make the crop, and each party furnishes an equal amount or one half the fertilizers used to make it, with agreement to divide the crop equally, a tenancy in common in the crop exists under § 2760, Code 1896.
2. *Tenancy in Common; Services of Cotenant; Recovery for Services.*—Where a minor makes a contract such as to render him a cotenant of the crop with the land owner, neither he nor his parents can recover of the land owner for services rendered by the minor towards making the crop, the same being rendered by such minor for his own benefit.

APPEAL from Geneva County Court.

Heard before HON. P. N. HICKMAN.

Action by Lydia Clemmons against George H. Hendricks. From a judgment for plaintiff, defendant appeals.

W. O. MULKEY, for appellant.—Under the facts in this case the mother acquiesced in the contract made by

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the son and cannot recover.—*R. C. P. & G. R. R. Co. v. Moon*, 66 Ark. 413; *Nixon v. Spencer*, 16 Iowa, 214; *Gayle v. Parrott*, 1 N. H. 28; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Whiting v. Earle*, 3 Pick. 201.

C. D. CARMICHAEL, for appellee.—Under the facts testified to by the appellant the relation of hire existed between him and the minor; the mother was not a party to the agreement and not bound by it. A person hires and pays a minor at his peril.—19 Ala. 604; 92 Ala. 78; 17 A. & E. Ency. of Law, (2nd Ed.) 379.

DOWDELL, J.—This is a suit on the common counts, brought by the appellee, who was plaintiff in the court below, to recover of the defendant reasonable value for the services of her minor son, rendered by the latter to the defendant. The evidence discloses that the plaintiff's son, who was a minor about 17 years of age, contracted with the defendant for the rent of a farm to be worked by him on a plan known and called "on halves"; that is to say, on a plan for an equal division of the crops raised on the land. The defendant was to furnish the land and team to cultivate the same, and plaintiff's son to furnish the labor. The contract further provided that each was to furnish one-half of the fertilizers to be used on the land in the cultivation of the crops.

It is insisted by counsel for appellee that under the law (section 2712, code of 1896) this was a contract of hire, and that, the defendant having so contracted with plaintiff's minor son without her consent or authority, and having received the benefits of his services, he is liable to her for the value of the same. The law is well settled that the parent is entitled to the services of his minor child, and that one who receives the benefit of such services is liable therefor to the parent. Such is the general rule of the law. There must, however, exist a contract of hire, express or implied, and under which service is rendered and received. But for the statute it is clear that the contract would not be one of hire, and it could not be said under such contract that the defendant received the benefit of services rendered by the other

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contracting party, and for which at law he would be liable. Does the contract shown by the evidence in the case fall within the terms of the statute? We think not. The statute provides as follows: "When one party furnishes the land and the team to cultivate it and another party furnishes the labor, with stipulations express or implied, to divide the crop between them in certain proportions, the contract of hire shall be held to exist," etc. So much the contract in question contained. It, however, did not stop with this, but went a step further and provided that each party should furnish one-half of the fertilizers to be used in making the crop. This additional provision to the contract took it without the influence of section 2712, and, being without the statute, it cannot be said to be a contract of hire. The contract was such a one as, under section 2760, created a tenancy in common between the defendant and the plaintiff's minor son of the crops grown.

The services rendered by the minor son in his preformance of his part of the contract were for his own benefit in raising the crops, in which he was to have an equal share, and were not services rendered as such for the defendant, and for which he could make the defendant liable in an action at law for the value of his services. If the minor son could not by next friend maintain an action against the defendant for the value of his services performed under the contract, we are unable to see how the parent could maintain such an action. Under the foregoing view, our opinion is that the trial court erred in the judgment rendered. The judgment, therefore, will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ.,
concur. z

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Jebeles & Colias Conf. Co., v. Brown.

Action to Recover Half Value of Partition Wall.

(Decided June 5, 1906. 41 So. Rep. 626.)

1. *Party Walls; Construction of Contract.*—Where adjoining owners contracted that in consideration of the building of a wall by one partly upon both lots, the other, when he built upon his lot, would pay to the one, one half the cost of the wall, such other, when he built upon his lot was liable to the one for half the cost of the wall, whether he joined to it or not.
2. *Same; Covenants Running With the Land.*—Under a contract to pay one half the cost of the wall to be built by one of adjoining lot owners, in which it is expressly provided that the covenant to make such payment shall run with the land and be binding on the present and future owners of the land, such covenant does run with the land and binds successive owners.

APPEAL from Birmingham City Court.

Heard before HON. CHARLES W. FERGUSON.

Action by the Jebeles & Colias Confectionery Company against W. S. Brown. From a judgment for defendant, plaintiff appeals.

The appellant brought suit in the court below to recover \$1,250, the value of one-half of a party brick wall, setting out in full the contract between defendant and plaintiff's vendor. The terms of the contract are sufficiently set out in the opinion of the court. Demurrers were filed to the complaint on a number of grounds, but the material ones, and the ones discussed in the opinion, are: "(1) There is no averment to show that there was any consideration for the alleged agreement on the part of the defendant to pay the plaintiff \$1,250 for said half of said wall. (2) There is no averment to show that \$1,250 is one-half of the market value of the wall at the time of the bringing of the suit, or on the 12th day of October, 1903. (3) There is no averment to show when the defendant agreed and promised to pay plaintiff \$1,250 for one-half of said wall. (4) There

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is no averment to show that plaintiff was not at the time of the bringing of this suit using and enjoying and retaining the right to use, have, hold, and enjoy the whole of said wall. (5) There is no averment to show that the defendant is using or enjoying the use of said wall." The demurrers were sustained, and, the plaintiff declining to plead over, judgment was rendered for defendant.

POWELL & BLACKBURN, for appellant.—The strongest argument in favor of the position of the appellant is the wording of the agreement itself.—*Shirley v. Burns*, 22 Ky. Law Rep. 788, 58 S. W. 691. The covenant provided for in the agreement runs with the land and binds future as well as the then owners.—*Mott v. Oppenheimer*, 17 L. R. A. 409.

E. J. SMYER, for appellee.—(Counsel discusses the points raised but cites no authorities.)

SIMPSON, J.—This was an action brought by the appellant (plaintiff) against the appellee (defendant) to recover one-half the value of a partition wall, and is based upon the contract which is set out in the record. The arguments of counsel rest the case entirely upon the construction of this contract, while the case went off on the ruling of the court in sustaining a demurrer to the complaint in which such contract is set out. The argument of the appellee (defendant) is that, although the contract states that Mercer should pay for half of the partition wall when he began "to build or got ready to build," yet the evident meaning of the contract was that he was to pay for it only when he availed himself of the use of the wall by joining to it or building on it.

In the interpretation of contracts we must take the contract as it is written by the parties themselves, and we cannot infer that they intended anything other than that which is expressed or plainly indicated by the words of the contract. In this case, the contract starts out by stating that one party is about to build a wall and that both parties desired that the wall shall be built so that

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one-half of it shall rest on the lot of each party, and that it is to the interest of each of said parties to so build. This is a plain statement to the effect that each party considered it of some value to him that the wall should be erected in this way. The contract then goes on to state that, in consideration of the premises and the sum of one dollar, the wall shall be so built, and that Mercer (to whose rights and liabilities the appellee succeeds) should pay for half of this wall whenever he built on this lot or got ready to build. We cannot undertake to say what value he attached to the wall, nor why he considered it valuable to himself that the wall should be so built, while we might conjecture that, even if he did not build upon the wall or actually join his wall to it, yet he considered it valuable to him to have the wall there for the benefit of its lateral support to any wall which he might build, though not actually joined to it. However that might be, he has stated the fact that it was valuable to him and he has agreed to pay for it on that contingency, and not on the contingency of his joining to it. It may be further stated that, in this case, the complaint to which the court sustained the demurrer does not state in the last count that "in erecting said building the defendant joined his building to and used said party wall." Without going into the various points that have been raised, and the divergencies on minor matters in regard to covenants running with the land, it is sufficient to state that the decided weight of authority, both in quantity and quality, sustained the proposition that when a party wall is built by one of the adjoining proprietors, under an agreement such as was made in this case, which contained a distinct agreement that the "covenant shall run with the land and be binding on the present or future owners," the covenant does run with the land, and is binding on successive owners, of both covenantor and covenantee.—*Mott et al. v. Oppenheimer et al.*, 135 N. Y. 312, 319, 31 N. E. 1097, 17 L. R. A. 409; *Roche v. Ullman*, 104 Ill. 11, 19.

In Illinois, the case of *Roche v. Ullman*, 104 Ill. 11, was an agreement for building a party wall which was to "run with the land"; the suit being by the party who

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had built the wall against a successor to the other party to the covenant, who came into the property after several successive conveyances. The court held that the effect of the agreement was to give to each of the parties an easement on the other's lots "which became appurtenant to their several estates, and would pass to their respective assignees by any mode of conveyance that would transfer the land."—Page 18. And in short the court determined that according to the "decided weight of authority" the last owner of the lot, upon which the burden of paying for one-half of the wall rested, "became bound for the performance of the covenant to pay one-half the cost of constructing the wall."—Page 19. In the case of *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146, H. and A., being adjoining lot owners, made the party wall agreement. G. became a successor to H., the party to build the wall, and K., successor to A., the party who agreed to pay. K., desiring to build, filed a bill stating that H. (the original builder) and G. (his successor) each claimed the money, and praying that they be required to interplead. The court held that, while the obligation to pay passed to the successive owners as appurtenant to the land, yet that as to the party who originally built the wall it became a debt due him, and did not pass, but remained a debt due to him, and gave the singular reason that otherwise each successive owner would be entitled to demand payment for half of the wall, although it had been previously paid to his predecessor.—Page 208, 115 Ill., page 285, 3 N. E. (56 Am. Rep. 146). It is clear that no such result would follow. In referring to the case of *Roche v. Ullman*, *supra*, the court recognizes the correctness of that decision to the effect that the last successive owner was liable to pay for one-half of the wall when the time for payment according to the agreement arrived.—Page 211, 115 Ill., page 287, 3 N. E. (56 Am. Rep. 146). In Massachusetts, the case of *Joy v. Boston Penny Savings Bank*, 115 Mass. 60, was one in which the agreement in regard to the party wall merely authorized one lot owner to build on the line, and the other party agreed that he, his heirs, or assigns would pay for one-half the cost when they used it, and nothing was said about the agreement

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(which was not under seal) running with the land. The court held the contract to be a personal one; the court referring to the fact that it was nothing but "a simple contract," and there was nothing in the deed to show an intent that the right to the payment should pass, although it seems to be admitted that the last owner who used the wall "might be held chargeable for the cost of the half so used." In a later case, the agreement did not state that the agreement (which was under seal) should run with the land, but merely that "this agreement shall bind ourselves, our heirs, assigns, and representatives, forever." The court held that the agreement created mutual covenants running with each lot." The court drew the distinction between a merely personal agreement, and one creating "an easement of use and support in favor of each lot owner," and held that "the burden and benefits were inseparably connected" and that the party could no more avoid paying than he could prevent the wall from standing.—*King v. Wright*, 155 Mass. 444, 29 N. E. 644. In the later case of *Pfeifer v. Matthews*, the court recognized the same principle, but held that in that case the same person who owned the adjoining lot and built to the wall became indebted for his half of the wall, and that the purchaser at mortgage sale, who came in thereafter, could not be made liable. The Supreme Court of Indiana held that the covenant to pay for half of a party wall ran with the land, while the question whether the right to receive payment also ran with the land depended "upon the contract," and, as in that case the original builder in conveying his lot specially reserved the right to receive the compensation, it went to him.—*Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198. The Supreme Court of Missouri, in a case where the adjoining lot owners made a party wall agreement, with no mention of its running with the land, and not even mentioning heirs and assigns, the court held that the agreement could be enforced in equity between subsequent owners.—*Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433. In a previous case that court had decided, in a case where the party wall agreement made no mention of its running with

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the land and did not even mention heirs and assigns, that the contract ran with the land, so as to make the owner of the adjoining lot at the time of joining to the wall liable; but, as the contract was merely personal, the right to receive payment did not pass from the original contracting party, as there was nothing in the contract to indicate that intention.—*Huling v. Chester*, 19 Mo. App. 607. The Supreme Court of Minnesota held that it was competent for the parties to make the contract a mere personal obligation, and in the case before that court held that subsequent purchasers of the burden lot took it with the obligation to pay for half of the wall when the condition happened, and that from the language of the contract, the court gathered that the right to receive the money remained with the original builder of the wall.—*Pillsbury v. Morris*, 54 Minn. 498, 56 N. W. 170.

A careful writer in an exhaustive examination of this matter states that "the general interpretation is that, if the builder sells his property before the adjoining lot owner builds, he conveys his vendee title to the whole wall and the right to collect cost of half of the wall from the other when he builds."—*Simms on Covenants*, p. 217. Our own court has not passed upon the exact question of a party wall agreement, but its deliverances on the subject of covenants running with the land indicate an agreement with the principle before state.—*Robbins v. Webb*, 68 Ala. 393; *Gilmer v. M. & M. Railway*, 79 Ala. 569, 58 Am. Rep. 623; *M. & M. Ry. v. Gilmer*, 85 Ala. 422, 5 South. 138. It will be observed that, in all the agreements referred to in the various cases, the agreements provided for payment when the other party used the wall; but in this case that expression was carefully avoided, and the party was to pay whenever he determined to build on his lot. The demurrer was consequently erroneously sustained.

The judgment of the court is reversed, and the cause remanded.

TYSON, ANDERSON, and DENSON, JJ., concur.

[McConnell v. Adair.]

McConnell v. Adair.*Action for Rent Under Contract.*

(Decided May 17, 1906. 41 So. Rep. 419.)

1. *Trial; Instructions; Form and Requisites.*—Where there was no controversy as to the renting or the amount to be paid and the only controversy was over the defense set up that defendant was entitled to compensation for the interruption of his business by tearing down and rebuilding a wall, a charge that if the jury does not believe the evidence they must find for the defendant, was confusing and misleading, and its giving error.
2. *Landlord and Tenant; Action for Rent; Instructions.*—Where the sublessee set up as a defense to an action for the rent that he ought to have compensation for the interruption of his business by tearing down and rebuilding a wall, a charge asserting that if plaintiff paid the principal lessee a sum for the privilege of remaking the wall, this was evidence of damage to the party in possession, was erroneous.

APPEAL from Walker Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by J. L. McConnell against J. E. Adair for rent growing out of a contract of lease. The defense interposed was that Adair was a sub lessee and was damaged in a certain amount by the repair of the wall made by McConnell during the time of the lease. There was evidence tending to show that the original lessee had been paid a sum certain for the privilege of repairing the wall by McConnell. The other facts, together with the charges refused, are sufficiently shown in the opinion. From a judgment for defendant plaintiff appeals.

JAMES A. MITCHELL and LACEY and LACEY, for appellant.—The first charge requested by the defendant and given by the court was error.—*A. G. S. R. R. Co. v. McAlpin*, 80 Ala. 63; *Siebold v. Rogers*, 110 Ala. 438. The charge was misleading and tended to impress the jury that they should find for the defendant if they disbelieved any portion of the evidence.—*Vandiver v.*

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Waller, 39 So. Rep. 140. (The counsel discuss the other charges given but cite no authority.) The court should have granted the plaintiff a new trial.—*Cobb v. Malone*, 92 Ala. 630; *Western Ry. of Ala. v. Cleghorn*, 39 So. Rep. 136.

RAY, LEITH & SHEPHERD and ACUFF & McCULLUM, for appellee.—The complaint in this case was based on a written contract which was set out specifically and the evidence showed that this contract had been changed. There was, therefore, a variance.—*Griffin v. Bass Foundry Co.*, 135 Ala. 490; *Griel v. Solomon*, 82 Ala. 85; *Moses v. Beverly*, 137 Ala. 480.

This being a civil case charges requested were properly given.—*A. G. S. R. R. Co. v. McAlpin*, 80 Ala. 76. The court properly refused to grant new trial.—*Cobb v. Malone*, 92 Ala. 630; *White v. Blair*, 95 Ala. 147; *Jones v. Tucker*, 132 Ala. 305.

SIMPSON, J.—This was an action for rent due under a written contract, in which judgment was rendered in favor of the defendant, and the assignments of error are to certain charges given by the court and to the action of the court in overruling a motion for a new trial.

The first assignment of error is to the giving, on request of the defendant, of the written charge: "If the jury do not believe the evidence in this case, they must find for the defendant." This is a charge which has been considered by this court several times in different lights. In *A. G. S. R. R. Co. v. McAlpine*, 80 Ala. 73, the evidence was without conflict that the mare had been killed by the railroad, and the question before the jury was whether the defendant had sustained its contention that the killing was without negligence, in regard to which the burden was on the defendant. The court had given the general charge in favor of the defendant, and this court said that it was proper for the court to charge the jury, on request by plaintiff, that if, "under the facts and circumstances shown in evidence, they did not believe the evidence offered by the defendant tending to acquit itself of negligence, then a verdict may be found

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as to the mare for the plaintiff." In the case of *Segars v. State*, 86 Ala. 59, 5 South. 558, the only witness on the part of the state was impeached by contradictory statements, and this court held that it was proper to give the charge that, "if the jury have a reasonable doubt" of the truths of the statements of said witness, they cannot convict, because "the jury are not authorized to find the defendant guilty on the evidence of a single witness upon whose testimony the question of guilt depends, if they have a reasonable doubt of the truth of his statements." In the case of *Seibold v. Rogers*, 110 Ala. 438, 18 South. 312, the *McAlpine Case* was followed, without argument, in an action of trover, as "the burden was on the plaintiff to make out his case by proof, and, if the evidence he offered in that behalf was not to be believed by the jury, there was a failure of proof entitling the defendant to a verdict. This last case came up for review and was modified in the case of *Koch v. State*, 115 Ala. 99, 22 South. 471; this court holding that in that case such a charge was properly refused, saying: "The charge is obscure, its meaning difficult to interpret, and it was calculated to confuse and mislead the jury,"—going on to say that, as the evidence was in conflict, "the instruction predicated the finding of the defendant not guilty, upon the disbelief by the jury of the defendant's own evidence, as well as that offered by the state. Such a charge is not in keeping with the well-established procedure for the proper determination of the issues in a cause in which a party always invites the jury to believe and avouches the truth of the evidence he introduces. He may not, therefore, in an instruction he asks, predicate a verdict in his favor upon a disbelief by the jury of his own evidence."—Page 105 of 115 Ala., page 473 of 22 South.

In the case now under consideration, there was no controversy in regard to the testimony of the plaintiff in regard to the renting and the amount of rent which was agreed to be paid. The only controversy was in regard to the defense set up by the defendant, to-wit, that he was entitled to compensation on account of the

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interruption of his business by the tearing down of the wall and rebuilding it. A charge like this would be meaningless in this case, as it would require the jury to find for the defendant, only in case they disbelieved all the evidence, upon which both parties agreed, about the renting. If it was intended to be limited to that evidence in which there was a conflict, then the entire defense would be swept away, leaving the rent contract alone and entitling the plaintiff to a verdict. It was error, then, to give such a charge in this case, and there are few cases in which it is proper at all.

The court erred in giving the jury charge No. 8: "If the jury believe from the evidence in this case that the plaintiff paid Griffin \$50 for the privilege of making the walls, this is evidence of damage to the party in possession." This is not a proper way to prove damage to the defendant. The court could not say what the reasons were which induced Griffin to receive or the lessor to pay \$50 for the permission to build the wall. That could not furnish any criterion as to what damage was done to the defendant, who was in possession as sublessee under Griffin.

It is unnecessary to pass on the overruling of the motion for a new trial. The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur.

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Breach of Contract.

(Decided May 17, 1906. 41 So. Rep. 182.)

1. *Evidence; Parol Evidence to Vary Written Contract; Contract of Sale.*—When the contract requires that the seller deliver coal by wagons to the buyer's furnaces, and that the buyer pay for it a certain sum per bushel of 2748 cubic inches, to be measured in cabs of the buyer at its furnaces, such contract is com-

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plete and cannot be varied or explained by proof of custom or usage.

2. *Sales; Construction; Quantity; Ascertainment.*—Under a contract by which the seller of coal agreed to deliver it by wagons to the buyer's furnaces, and the buyer agreed to pay a certain sum per bushel of 2748 cubic inches to be measured in the cab at the buyer's furnaces, and under this contract the buyer received the coal at its shed 75 or 100 yards from its furnaces, measuring it and receipting for it at such sheds; the place of delivery or receipt was the place of measurement to ascertain the quantity of coal, and not the furnace to which the coal was transported by means of the cabs into which it was loaded at the shed.

APPEAL from Shelby Circuit Court.

Heard before HON. JOHN PELHAM.

Action by B. W. Dupree against the Shelby Iron Company for charcoal alleged to have been delivered and not paid for. The contract and the facts on which the opinion is rested sufficiently appear therein. There was judgment for plaintiff and defendant appeals.

KNOX, DIXON & BURR, for appellant.—“Where valid usages prevail in respect to the subject-matter of a contract and the parties to the contract are chargeable with knowledge thereof, such usages are presumed to be tacitly incorporated into the contract so far as they are not expressly or impliedly negatived by the express terms; and parol evidence of such usages is permissible to interpret the contract.”—29th Am. & Eng. Enc. of Law, 2d Ed., p. 421; *Montgomery & Eufaula Ry. Co. v. Kolb & Hardaway*, 73 Ala. 396; *McClure & Co. v. Cox*, *Brainard & Co.*, 32 Ala. 617; *Ala. & Tenn. R. R. Co. v. Kidd*, 29 Ala. 221; *Hosca v. McCrary*, 12 Ala. 349.

“Evidence of usage on the question as to quantity, terms and price is always admissible.”—Enc. of Law & Procedure, (12th Vol.) p. 1085.

“Knowledge of custom and usage can always, even in cases where the usage is so limited and local in its application that the presumptive evidence founded on its generality will not bring it to the parties' knowledge, be established by direct evidence of the parties' actual

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knowledge, as by notice or otherwise.”—29th Am. & Eng. Enc. of Law, (2d Ed.) p. 393.

“A usage, being a fact to be proven by the testimony of the persons acquainted with such fact; and the statement of a witness, sufficiently qualified by experience, as to what a usage is, is not an expression of opinion but a statement of fact.”—29th Am. & Eng. Enc. of Law, (2d Ed.) page 410; 32 Enc. of Evidence, pages 953-954.

“The previous course of dealing between the parties is very material and may often show knowledge of the usage, ever in the face of a denial of such knowledge by the party sought to be charged.”—29th Am. & Eng. Enc. of Law, (2d Ed.) p. 409.

“Proof of the generality of the usage is only requisite where no actual knowledge is brought home to the party against whom the usage is asserted. The usage of a single individual is admissible as against one who is shown to have known of it and contracted with reference thereto.”—29th Am. & Eng. Enc. of Law, (2d Ed.) pp. 392 and 393.

SAMUEL WILL JOHN, for appellee.—“It is the province of the court, to expound to the jury, all written instruments, which may be offered in evidence.”—*Martin v. Chapman*, 6 Porter, 344, 351; *Kidd & Co. v. Cromwell, Haight & Co.*, 17 Ala. 652; *Moore v. Lesscur*, 18 Ala. 609; *Long v. Rodgers*, 19 Ala. 331; *Wyatt v. Steele*, 26 Ala. 647; *Shook v. Blount*, 67 Ala. 303-4.

Had the court left, the construction of this written contract to the jury he would have committed an error.—*Long v. Rogers*, 17 Ala. 548; *Moore v. Lessuer*, 18 Ala. 609; *Shook v. Blount*, 67 Ala. 303-4.

SIMPSON, J.—This is an action by appellee (plaintiff) against appellant (defendant) for \$750, claimed to be due for charcoal delivered under contract originally made between appellant and one Christian, whose interest in the contract passed to the plaintiff. The contract is set out in the record, and the plaintiff claims that he has delivered more coal than he has received payment for, while the defendant contends that

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he has delivered only the amount for which payment has been made. The controversy arises from the contention of plaintiff, on one side, that the written contract is definite in all of its terms and is the sole exposition of the agreement between the parties, and the contention of the defendant, on the other, that certain questions should have been permitted to be asked of the witness to prove: (1) That it has been the established and well-known custom of the defendant to have the cabs so filled (with the charcoal) at the wagons or loading place that they would be full when they reached the furnace or elevator; and (2) that such was the well-known custom and usage of all well-regulated furnaces in this district. In other words, the defendant's contention is that, although the cabs may have been heaped up, above a level measure, at the place where the coal was received, yet if, after transportation from the place of delivery to the furnace stack, the coal did not rest above the level of the sides of the cab, then the defendant was liable only for the amount of coal which it is agreed that said cabs held by measurement.

The material parts of the contract are that the plaintiff "is to furnish and deliver the coal by wagons to their (defendant's) furnaces at Shelby, Ala.," and that the defendant "agrees to pay to said party of the first part, for each bushel of 2,748 cubic inches of charcoal, delivered under this contract, to be measured in the cabs of said party of the second part (defendant) at their furnaces, the sum of 6 cents, free, at their furnaces, at Shelby, Ala." The evidence is uncontroverted that said cabs were "60 inches long, 30 inches wide, and 30 inches deep, all inside measurement. So it was a matter of easy calculation as to how many bushels of the required dimensions would be held in the cabs, when loaded, so as to be level with the sides of the cab. The bill of exceptions also states that "the evidence showed without conflict" that this "five-peck" bushel of 2,748 cubic inches had been adopted in place of the regular bushel "to compensate for the space between the pieces of coal as loaded into cabs." The evidence is without conflict also, that the coal which was delivered was

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hauled in wagons to a shed on the furnace company's grounds, about 75 or 100 feet from the furnace stack, being the place designated by said company; that at said place the coal was emptied from the wagons, and the company's employes filled the cabs by forking the coal into them; that near by said place, so as to be convenient thereto, the defendant company had put up and maintained a box, in which were a number of paddles or boards with numbers on them to correspond to the number of the wagons delivering the coal; that when the forkers (servants of defendant) forked the coal which had been dumped from the wagon into the cab, they would make a score or mark on the board or paddle which had the same number as the wagon delivering the coal, and each day the agent of defendant, whose duty it was to inspect and receive the coal, would take up these boards or paddles, and from them ascertain how many bushels had been delivered.

Proof of custom or usage is not permissible to vary the terms of a contract, but where the language used is ambiguous, or its meaning is uncertain, usage is admissible to show what is meant thereby. Evidence is admitted to annex incidents to a contract, where it is apparent that the parties have omitted to state important parts, but not to add incidents inconsistent with the express terms of the contract.—29 Am. & Eng. Enc. Law, 427, 436; see, also, 12 Cyc. p. 1093, 1095, 1096, and notes. Where freight was received, "to be delivered to a railroad agent, at a certain place, proof was permitted of a custom to deposit in a warehouse there, because the agent did receive it, and the contract was silent as to what he should do with it after receiving.—*Ala. & Tenn. River R. R. v. Kidd*, 29 Ala. 222. In the case of *Montgomery & E. Ry. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, it was not a question of contradicting a written contract, but the paper that was contradicted by custom was merely a circular which the railroad had issued instructing its agents not to receive goods, without receipting for them, etc., and the proof showed that they had constantly disregarded those rules, and the custom as to how they did receive

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cotton was properly admitted. In that case Judge Stone says: "When persons enter into express stipulations, expressing the terms in which they enter into contracts, it is a reasonable rule, subject to only a few exceptions, that neither custom or usage will be allowed to dispense with such express stipulations."—Page 40. So, where the contract was that the hirer of a slave was to "lose the negro's lost time," it was inadmissible to prove a custom that that meant time lost by sickness, etc., and not time lost by death.—*Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374.

Where the parties differed as to what the price agreed on was, custom was not admissible to show what the price was, the court saying: "Evidence of usage and custom is not permitted to prevail over and nullify the express provisions and stipulations of the contract." Quoting also: "It may be that the very object of the contract was to avoid the effect of usage, and no evidence of usage can be admitted to contradict the (express) terms of the contract, or control its legal interpretation and effect."—*Wilkinson v. Williamson*, 76 Ala. 163; *Wilson v. Smith*, 111 Ala. 170, 175, 20 South. 134. Where a tenant signed a written agreement to pay 20 bales of cotton as rent, the landlord was not allowed to show "that it was a rule or custom he had made on his plantation that he should have all the cotton seed, even though this fact was known to the defendant, as this was a mere personal mode of dealing on the part of the plaintiff, * * * and it would seem to contradict the express terms of the rent note."—*Powell v. Thompson*, 80 Ala. 51, 55. The supreme court of the United States, speaking through Justice Miller, has said: "The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transaction took place, had gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with the rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When

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this is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent, either with authority, or with the principles which govern the law of contracts."—*Partridge v. Insurance Co.*, 15 Wall. (U. S.) 573, 579, 21 L. Ed. 229.

We hold that in this case the parties have expressed their contract in writing. There is no term omitted, no ambiguous term, no technical words needing explanation, and it is not open to explanation or addition by proof of custom. The contract expresses that the defendant is to deliver the coal "by wagons to their furnaces, and to pay so much for each 2,748 cubic inches of charcoal delivered * * * to be measured in the cab * * * at their furnaces." "At their furnaces" evidently meant on their furnace grounds at such a place as they may designate. When they received it in their shed, that was at their furnace, and certainly that was the construction given to it by the parties themselves, for it was to be hauled to the place of delivery by the wagons. It was thrown into the cabs there, by their own hands, noted on the boards, and receipts given, so that the delivery was complete, and that was the place of measurement. To hold otherwise would be to say that, although the contract says you are to deliver 2,748 cubic inches in the cab, yet by custom I have a right to take 2,748 inches in the cab and then pile several bushels on top, to insure me against shrinkage, notwithstanding we have already added a peck to each bushel and put it in the contract for that purpose.

The construction of the contract was for the court, and we hold that the court construed it correctly. The

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evidence does not raise any question as to the quality of the coal.

The judgment of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

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Assumpsit.

(Decided May 9, 1906. 41 So. Rep. 159.)

1. *Attorney and Client; Money Collected; Action; Parties Plaintiff Real Party in Interest.*—Where the facts stated in the complaint show an implied contract to pay over money collected by an attorney for a client, the case is brought within the influence of § 28, Code 1896, and the suit should have been brought in the name of the real party in interest.
2. *Appeal; Review; Questions for Review; Bill of Exceptions.*—Motion to strike pleas, and parts thereof, and the court's action thereon, must be shown by the bill of exceptions, else they cannot be considered on appeal.
3. *Corporations; Assignment of Claim; Sufficiency.*—In the absence of evidence showing that the vice president of a corporation was authorized to execute the assignment of a claim, such assignment executed by the vice president, to which the corporate seal was not attached, was inadmissible in evidence in an action on the claim, especially where such assignment recites that the vice president was authorized to execute it "in the name and under the seal."

APPEAL from Colbert Circuit Court.

Heard before HON. D. W. SPEAKE.

Action by J. V. Allen against R. C. Alston as executor of Thompkins, deceased, for money alleged to have been collected by Thompkins for the Scovill-Irwin Const. Co. and assigned to Allen. The original complaint was brought in the name of the Scovel-Irwin Const. Co., for the use of J. V. Allen and counted on the collection by defendant's testator of a certain sum of money as an

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attorney for the construction company and shows an assignment of said claim of the Scovell-Irwin Const. Co. to J. V. Allen before the bringing of this suit. It is alleged that demand was made on defendant's testator both by the original party and its assignee, said Allen, for re-payment of the sum so collected.

Demurrers were interposed to this complaint (1) because it failed to state a cause of action; (2) because it appears from the complaint that J. V. Allen is the real and beneficial owner of the subject-matter of the suit; (3) it appears from said complaint that plaintiff in said cause, the Scovel-Irwin Construction Company, is not the owner of the subject-matter of the suit; (4) it appears from said complaint that the suit is not instituted in the name of the party owning the subject-matter of the suit. These demurrers were sustained by the court, and plaintiff amended his complaint by making J. V. Allen the sole party plaintiff.

The plaintiff offered the following as evidence, after showing that H. S. Jackson was the vice-president of the Scovel-Irwin Construction Company on the 4th day of February, 1902, and that as such vice-president he signed the assignment which follows: "For value received the Scovel-Irwin Construction Company hereby sells, transfers, and assigns unto Joseph V. Allen that certain judgment rendered in favor of the Scovel-Irwin Construction Company in the circuit court of Colbert county, state of Alabama, on the 7th day of January, 1897, against the Sheffield Land & Iron Co. of Alabama for the sum of \$1,185, and that said Scovel-Irwin Construction Company transfers and assigns unto the said J. V. Allen all its rights and equities therein and thereunder, hereby authorizing said Allen or his assigns to bring any action in its name, either at law or in equity, for the collection of said judgment or its proceeds. In testimony whereof, the Scovel-Irwin Construction Company has executed these presents by its vice-president, who is duly authorized to execute the same in the name and under the seal this the 4th day of February, 1902. (Signed) Scovel-Irwin Construction Co., by H. S. Jackson, V. P." There is no seal shown. The defendants

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objected to the introduction of the assignment, because it was not under seal, and because it was not shown that Jackson was authorized by the corporation to execute it for and in its name. The court sustained the defendant's objection, stating that, as the alleged transfer was not under seal of the corporation, there was no presumption that Jackson, although vice-president, was authorized to execute the same so as to bind the corporation.

R. H. WILHOYT, for appellant.—The original suit was properly brought in the name of the construction company for the use of Allen.—§ 28, code 1896. The judgment was a contract within the statute.—*Smith v. Hariman*, 33 Ala. 706; *Johnson v. Martin*, 54 Ala. 271; *Masterson v. Gibson*, 56 Ala. 56; *Wolffe v. Eberlin*, 74 Ala. 99. It therefore follows that the demurrers were improperly sustained. The assignment made to Allen by the construction company was in proper form and should have been admitted.—§ 1036, code 1896; 13 Ala. 234; *Minor*, 268; 2nd *Mayfield*, 219. A seal to an instrument of this character is not necessary, as corporations can act without seal whenever natural persons can.—4 *Thomp. on Corp.* § 5046. The regularity of the corporate acts and the authority of the actors is presumed.—*Ib.* § 5029.

KIRK, CARMICHAEL & RATHER, for appellee.—The complaint showed a breach of contract on the part of defendant to pay over money collected by his testator as an attorney and the defendant's liability is upon the contract and the suit must be in the name of the party really at interest.—§ 28, code 1896; *Skinner v. Bedell*, 32 Ala. 44; *Ryall v. Prince*, 82 Ala. 264; *Pen. R. R. Co. v. Schafer*, 76 Ala. 233; *Lervystein v. Marks*, 56 Ala. 564. The motion to strike the pleadings from the file must be shown by bill of exceptions to be reviewable.—*Dothan Guano Co. v. Ward*, 132 Ala. 380; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 537. The court properly excluded the alleged assignment of the judgment by the construction company to Allen because it was not shown

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that the vice-president had authority to make the transfer, it not being under the seal of the corporation.—*Olney v. Chadcy*, 7 R. I. 224; *Merchant's Bank v. Rawls*, 7 Ga. 191; *American S. & L. Asso. v. Smith*, 122 Ala. 505; *Goodyear Rubber Co. v. Scott*, 96 Ala. 439; *Norton v. Alabama Natl. Bank*, 102 Ala. 420; *Swann & Billups v. Miller*, 82 Ala. 530; *Wear v. Swann & Billups*, 79 Ala. 330; *Jinwright v. Nelson*, 105 Ala. 399; *Thornton v. Gould*, 59 Ala. 465.

ANDERSON, J.—This suit was brought in the name of Scovel-Irwin Construction Company for the use of J. V. Allen.

The facts set out in the complaint show an implied contract on the part of Tompkins to pay over the money collected by him and bring the case within the influence of section 28 of the code of 1896, and the suit should have been brought in the name of the party really interested. There was no error in sustaining the demurrer to the complaint.

As the action of the trial court upon the motion to strike certain pleas and parts thereof is not presented for review by the bill of exceptions, we cannot consider the same.—*Dothan Guano Co. v. Ward*, 132 Ala. 380, 31 South. 748; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 537, 29 South. 602.

The assignment offered did not have the corporate seal attached, nor was there any proof that Jackson had the authority to execute the same. Indeed, the assignment itself recites that Jackson is authorized to "execute the same in the name and under the seal," yet fails to show that it was so executed.—*American Association v. Smith*, 122 Ala. 505, 27 South. 919; *Goodyear Rubber Co. v. Scott Co.*, 96 Ala. 439, 11 South. 370; *Cook on Stocks*, § 712.

The trial court properly sustained the objection to the introduction of the assignment in evidence.

The judgment of the court is affirmed.

HARALSON, DOWDELL and DENSON, JJ., concur.

[Eagle Iron Co. v. Baugh.]

Eagle Iron Co., v. Baugh.

Action for Breach of Contract.

(Decided June 14, 1906. 41 So. Rep. 663.)

1. *Principal and Agent; Existence of Relation.*—Evidence of the statements or admission of an agent are not admissible against the principal for the purpose of establishing the authority of the agent, nor can such authority be established by showing that he acted as agent or claimed to have the powers he assumed, when his authority is questioned; such statements and admissions become competent only after some other evidence has been introduced tending to show such authority, or when such other evidence has been subsequently introduced.
2. *Sales; Breach of Contract; Damages; Evidence.*—In an action for damages for the breach of a contract to purchase a certain quantity of wood, evidence of what the seller received for the wood which the buyer in the contract refused to receive was admissible to enable the jury and court to arrive at the damages.
3. *Parties; Striking Out.*—Where the party to the contract and its agent in the purchase of the wood were jointly sued for a breach of the contract, and the evidence failed to disclose any individual liability on the part of the agent, it was proper to permit an amendment striking out the agent's name as party defendant.
4. *Pleading; Pleas in Abatement; Time for Filing.*—A suit was filed against a corporation and an individual, in the county in which the individual lived, and in which the corporation had no place of business. During the course of the trial plaintiff amended by striking out the individual sued as party defendant and the corporation offered to file a plea in abatement. Held, construing §§ 3271, 4205, and 4207. Code 1896, and Rule of Circuit Court Practice, No. 12, together, that the defendant corporation was entitled to file its plea in abatement to the jurisdiction of the court.
5. *Evidence; Burden of Proof; Degree of Proof Required.*—In a civil case facts in issue need only be shown to the reasonable satisfaction of the jury. It is not necessary to show them to a "reasonably certainty."

APPEAL from Marshall Circuit Court.

Heard before HON. W. W. HARALSON.

[Eagle Iron Co. v. Baugh.]

Action by Jack Baugh against the Eagle Iron Company. From a judgment for plaintiff, defendant appeals. This was an action by appellee against appellant for failure to take 500 cords of oak and pine wood, which appellant had contracted to take from appellee, and which appellee had tendered to defendant. The disputed question was whether or not Stewart was the agent of appellant with authority to make the contract for the purchase of the wood, and there was conflict in the testimony as to the value of the wood and of the cost of putting it on the line of railroad. The action was begun against appellant and one Stewart jointly. Stewart resided in the county in which the suit was brought, while the appellant corporation had no place of business there, but had its works and other things in Etowah county. After the testimony was in, plaintiff was allowed to amend his complaint by striking Stewart as a party defendant. The Eagle Iron Company then asked leave to file plea in abatement setting up the fact of want of jurisdiction in the court to try the cause in the absence of Stewart.

The court, at the request of the plaintiff, gave the following charge: Charge 3: "The court charges the jury that the burden of proving that H. J. Carwile delivered 425 cords of wood on the contract sued on is on the defendant, and it is not sufficient for the defendant to show merely that 425 cords of wood were sold and delivered to defendant; but it must be proven by defendant with reasonable certainty that the wood was put in on this contract, and not on some other contract." Charge 6, requested by the defendant, was the general affirmative charge.

JOHN A. LUSK, for appellant.—The declarations of one assuming to be an agent, when not of the *res gestae*, are not admissible to prove what was done or to prove agency.—Abbott's Trial Brief, p. 128; *Hirsch v. Oliver*, 18 S. E. 354. If McLane had been the person who made the contract with plaintiff as agent of the defendant, his statement subsequently made would not be admissible to prove that the contract was made.—20 Ala. 122;

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4 Mayfield, p. 550. Admissions of an alleged agent are not competent to prove his agency nor are his declarations admissible to prove the fact of agency.—Elliott on Evidence, 252; 2 Greenleaf (16 Ed.) p. 63; Abbott's Trial Brief, p. 128; 4 Mayfield, pp. 525, 527, 550; 3 Stewart, 18; 111 Ala. 453. To render admissions or declarations of an agent admissible as evidence against or obligatory upon an alleged principal they must be contemporaneous with and explanatory of the act within the scope of the authority of such agent, and while in the execution of the agency.—4 Mayfield, pp. 527 and 549; 72 Ala. 112. What the principal did or did not do, or what the agent did or omitted to do with other and different parties than the plaintiff was not admissible.—*Bunzel v. Maas, et al.*, 116 Ala. 68; 2 So. Rep. Dig. 1003; 1 Elliott on Evidence, § 159.

STREET & ISBELL, for appellee.—The fact that McLane while in the office of defendant company and while attending to its business held himself out to the world as a superintendent or business manager is competent.—*Talladega Co. v. Peacock*, 67 Ala. 253; *Railroad Co. v. Davis*, 91 Ala. 615. The contract with plaintiff having been made with Stewart, it was necessary to show that Stewart was defendant's agent and the evidence offered along that line was admissible.—*Tenn. Riv. Navi. Co. v. Kavanaugh*, 101 Ala. 1; *Reynolds v. Collins*, 78 Ala. 94; *Talladega Co. v. Peacock, supra*; 1 A. & E. Ency. of Law, p. 960. It was not error to permit the name of Stewart to be stricken as party defendant nor did it work a discontinuance.—*Mock v. Walker*, 42 Ala. 668; *Fennell v. Masterson*, 43 Ala. 268.

ANDERSON, J.—“The authority of an agent, where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; nor can his authority be es-

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tablished by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise."—*Mechem on Agency*, § 100; *Galbreath v. Cole*, 61 Ala. 140; *Wharton on Evidence*, § 1184; *Scarborough v. Reynolds*, 12 Ala. 252; *Postal Co. v. Lenoir*, 107 Ala. 640, 18 South. 266; *L. & N. R. R. Co. v. Hill*, 115 Ala. 334, 22 South. 163. Any declaration of the agent as to his authority would be admissible, when other evidence had been shown from which authority to do the thing may be inferred; or, if the trial court improperly admitted declarations of the agent, the error would be cured by evidence subsequently introduced from which authority might be inferred, and in case such evidence was introduced the question of authority would become one of fact for the determination of the jury.—*Birmingham R. R. Co. v. Tenn. Co.*, 127 Ala. 137, 28 South. 679. There was evidence from which the jury could infer that McClane, the superintendent, had authority to contract for and buy wood for the defendant, and to delegate the authority to others, and that Stewart was its agent, independent of the acts and declarations of McLane and Stewart. There was evidence from which it could be inferred that these men were held out as agents with authority to buy wood, and also of a ratification by the defendant of their acts. The trial court committed no reversible error upon the rulings on evidence relating to the authority of Stewart to contract for the wood. The trial court erred in not permitting the defendant to show what plaintiff got for the nine cords of wood sold by him. Plaintiff had shown, as a part of his damage, the value of this wood and the defendant's refusal to take it. If plaintiff sold it, the sum that he got for same should have been deducted from the amount of damages sustained. We need not consider the other rulings on the evidence, as they were either correct or innocuous to defendant if erroneous.

The evidence having disclosed no individual liability against Stewart upon the contract, there was no error in permitting the plaintiff to amend by striking his name out as a party defendant.

While rule 12 (page 1197 of the code of 1896) requires

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that pleas in abatement must be filed within the time allowed for pleadings, and ordinarily such a plea should not be entertained at a subsequent term of court, yet the plea should have been permitted in the case at bar. The corporation was sued jointly with Stewart, and in Marshall county, where Stewart resided, and under sections 4205 and 3271 the question of venue was not open to the Eagle Iron Company so long as Stewart was a joint defendant; but, after the plaintiff eliminated Stewart from the suit, the corporation became the sole defendant, and had the right to then question the venue of the action. Section 4207 applies to suits against corporations when they are sole defendants, and does not conflict with sections 4205 and 3271 in reference to suits against two or more defendants.

Charge 3, given at the request of the plaintiff, required too high a degree of proof of the facts postulated. In civil cases facts are not required to be proved with reasonable certainty. To the reasonable satisfaction of the jury is sufficient.—*Anniston Co. v. Southern Ry. Co.*, (Ala.) 40 South. 965; *Battles v. Tallman*, 96 Ala. 403, 11 South. 247; 3 Mayfield's Dig. pp. 597-598.

There was no error in refusing charge 6, requested by the defendant.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

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Assumpsit.

(Decided June 30, 1906. 41 So. Rep. 978.)

Judgments; Res Adjudicata.—Plaintiff, in a former action, sued defendant upon certain notes given for a stock of goods, and for the interest due on others given for the same purpose. The defendant pleaded failure of consideration. Plaintiff had judg-

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ment for less than the amount of the notes sued on, and the interest on the other notes. Held, such judgment did not operate either as a bar to the plaintiff's right to sue on the other notes, or to the defendant's right to set up failure of consideration as to the other notes.

APPEAL from Morgan Circuit Court.

Heard before HON. JOHN C. EYSTER, Special Judge.

Action by Lorenzo Corey against James E. Penney. From a judgment for plaintiff, defendant appeals. In this action plaintiff sued defendant upon 36 promissory notes each for \$25, bearing interest from date, payable annually. He formerly had brought suit against Penney on 26 similar notes each for \$25, and in separate counts suing for the annual interest due on the said 36 notes not sued on. In that former suit Penney pleaded that the notes sued on were given in consideration of the sale by Corey to Penney of a certain stock of goods or plumbing supplies, and that said stock of goods was worth greatly less than what he agreed to pay for it and was not in fact worth exceeding \$500; that said sale was made and said notes executed upon the faith of certain false representations made by Corey to Penney, and these facts were pleaded in bar of the suit. Issue was joined on this plea and upon certain special replications thereto. The amount sued for in that suit, including the annual interest due on the 36 notes now in suit, was \$1,022. The jury rendered a verdict in favor of plaintiff for \$399, and judgment followed accordingly, which Penney paid. In this suit Penney by his third plea set up the alleged false representations in substantially the same plea as was filed in the former suit. Demurrers to this plea were overruled. Plaintiff replied, in substance, that Penney had pleaded this in the former suit, and that the plea or issue was decided against him by reason of the fact that the verdict and judgment were for plaintiff, although for greatly less than was sued for in that action; and that the defense was entire and indivisible, and that Penney by pleading it in that suit had exhausted his remedy and could not set up the same facts in bar of this suit upon other notes growing out of the same transaction, and upon notes

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the interest upon which was sued for in that former action; and that the judgment upon this issue in the former suit cut off Penney from pleading said false representations in this case. Defendant's demurrers to this replication were overruled. Defendant Penney, by his fourth, fifth, sixth, and seventh pleas, himself set up the former action and the judgment therein, as *res judicata* of this action and as conclusive of the issue that the stock of goods was not worth what they were sold for, and that the notes were without consideration, and that Corey had fraudulently represented to Penney certain facts as to their value and as to certain offers which Corey claimed had been made to him for the stock of goods by other parties. To these pleas plaintiff's demurrers were sustained, and upon issue joined on the fourth replication to the third plea a judgment was rendered in favor of the plaintiff; the parties agreeing in open court that the complaint, the third plea, and the fourth replication thereto stated the facts truly. From this judgment defendant appeals, assigning as error the rulings upon the demurrers to the fourth, fifth, sixth, and seventh pleas and to the fourth replication to the third plea.

HUMES & SPEAKE and CALLAHAN & HARRIS, for appellant.—No brief came to the reporter.

E. W. GODBY, for appellee.—No brief came to the reporter.

ANDERSON, J.—By the pleading in the former case defendant sought a recoupment of damages for the breach of the contract of sale, and was awarded the difference between the amount claimed in the notes sued on in the first suit and the amount of the judgment recovered, which was \$623, and which said sum is all that is available to the defendant for the breach of the contract of sale. And the defendant having exhausted his counterclaim growing out of said breach of sale, as represented by all of the notes, upon the suit for the collection of the matured series of notes, cannot now use the

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same breach for the purpose of reducing the amount due on the second series of notes. While two separate suits were brought on the notes, they maturing at different times, they all evidenced and represented the consideration of but one contract of sale, and under the pleading and judgment in the former case the defendant got the benefit of all damage by way of recoupment, to which he was entitled, and which was conclusive. And as the damage then awarded was less than the amount claimed in the former suit, the defendant thereby became precluded from setting up the same breach as a defense to the other notes, which had in no way entered into the amount awarded the plaintiff on the first payment. This court in discussing the conclusiveness of a plea of recoupment, while admitting that this is an unsettled question by some authorities, has set the lead which we will follow, and we quote Judge Stone, in the case of *South & North Alabama R. R. Co. v. Henlein & Barr*, 56 Ala. 374: "Such plea is in its very nature defensive, and the party making it seeks only to cut out, or keep back, a part or the whole of a plaintiff's demand. Whether such defense is a waiver or abandonment of all claim by reason thereof, save that which abates or defeats plaintiff's recovery, is not fully settled. This court, in *McLane v. Miller*, 12 Ala. 643, asserted the affirmative of the proposition, and declared that no action will lie for the recovery of a balance of a claim, a part of which has been used as recoupment of damages in a former suit, *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, decides the same thing. In *Waterman on Set-Off*, this question is treated as unsettled, referring to *Mandel v. Steel*, 8 Mees. & W. 858. See *Waterman on Set-Off*, § 531; *Mason v. Heyward*, 3 Minn. 182 (Gil. 116). We prefer to follow the lead of *McLane v. Miller*, *supra*, and hold that, in such case, no action can be brought for the residuum of a claim, a part of which has been utilized by way of recoupment in a former suit." In the case of *McLane v. Miller*, *supra*, it was said: "That the plaintiff having in a former action, where he was defendant, insisted on a rebatement of the hire which he was to pay for the slaves, and having ob-

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tained it, for the reason that his possession was determined by the defendant's act, he is concluded, so far as that extends, from again obtaining satisfaction for the same injury. It will be seen by this extract that the prohibition to recover extends only to the rebatement of the hire of the slaves, which the plaintiff had recouped in the former action, and therefore was not permitted again to insist on." It will be seen, by an application of the foregoing authorities to the case at bar, that the plea of recoupment in the former suit having fixed the defendant's damage for the breach of the contract, he is concluded from again obtaining satisfaction for the same injury. In the case of *Taylor v. Chambers*, 1 Iowa, 124, notes for part of the purchase price of logs were resisted by the maker, because the logs were bought by him as good merchantile logs, whereas they were really "rotten and hollow," and damaged 20 per cent.; but it was shown that on one of the hundred dollar notes, a prior suit had been brought, and defended on the same ground, resulting in a judgment against the defendant, the maker, for \$78. The court said: "The defendants set up and caused their demand for damages—their whole demand—to be adjudicated; and now to afterwards talk of their right to sever it is idle. When once adjudicated, and the amount deducted from the note in that suit, it no longer existed." See, also, *Gilmore v. Whiteman*, (Neb.) 70 N. W. 365; *Hoover v. Kilander*, (Ind. Sup.) 34 N. E. 697; *Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; *O'Conner v. Varney*, 10 Gray (Mass.) 231; *Britton v. Turner*, 26 Am. Dec. 713; *Southeland on Damages*, § 189. We consider the case of *Brown v. First National Bank*, 132 Fed. 450, 66 C. C. A. 293, relied upon by appellant, rather in favor of, instead of opposed to, the above doctrine.

The judgment of the circuit court is affirmed.

MCCLELLAN, C. J., and TYSON and SIMPSON, JJ., concur.

ANDERSON, J. (On rehearing.)—The foregoing opinion was adopted upon a misconception of the plea in-

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terposed in the former suit, which we find upon reconsideration to be one of "failure of consideration" instead of recoupment. This question has been fully discussed in a learned opinion rendered by Elliott, J., of the supreme court of Indiana, in the case of *Felton v. Smith*, 88 Ind. 149, 45 Am. Rep. 454, and as it is so very applicable to the case at bar we quote approvingly therefrom:

"The four assignments were as many separate and distinct causes of action, upon each of which an action might be maintained. The cause of action sued on in this case was independent of the others, and the recovery of the appellant was on that one cause of action alone. The amount awarded him was not upon three contracts not sued on, and which constituted independent causes of action, but upon the one contract sued on. The verdict and judgment settled nothing more than the right of the appellant to recover on the cause of action stated in the complaint. In *Campbell v. Board, etc.*, 71 Ind. 185, it is said: "A recovery on a part of a cause of action which is divisible is not a bar to an action brought upon the other part; but a recovery on the whole cause of action, of only a part of the amount, is a bar to a suit brought on the same cause of action for the balance of the amount. Where a judgment settles the entire defense to a series of notes, although rendered upon one only of the series, it conclusively adjudicates the controversy as to all of the series. This is, however, only where the entire subject-matter of the defense is litigated in the one action, and is determined by the judgment. It is not so where the litigation is as to the one note declared on, and the judgment does not extend to the whole subject-matter of the entire series of notes.—*French v. Howard*, 14 Ind. 455; *Hereth v. Yandes*, 34 Ind. 102; *Turner v. Allen*, 66 Ind. 252; *Gardner v. Buckabee*, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; *Edgell v. Sigerson*, 26 Mo. 583; *Hazen v. Reed*, 30 Mich. 331. In this case it cannot be said that the judgment determined the entire controversy, for the appellee did not succeed upon the issues tendered by him; nor, on the other hand, did the appellant obtain judgment for

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all he claimed. If the latter had recovered judgment for the full amount claimed, he could not successfully claim that it settled his right to recover on all the other notes. Nor can it be justly said in the case before us that the whole subject-matter of the controversy was litigated, for the defenses pleaded were different, and those professing to go to the entire subject-matter did not necessarily involve an investigation to an extent beyond what was necessary to ascertain the appellant's measure of damages. This we say for the reason that under a plea of want of consideration partial failure may be shown. If the verdict and judgment had sustained the plea of want of consideration, then it might, with some plausibility, have been maintained that the whole controversy was determined; but this they did not do, for they merely cut down the appellant's damages, and did not find that he had no cause of action. The appellant established his cause of action, but did not recover all the damages his *prima facie* case entitled him to, and his adversary did not succeed in establishing any defenses except such as went to the amount of recovery, and it cannot be said that this extended beyond the cause of action declared on. The issue decided was really as to the amount to be recovered on that single cause of action, and not as to the amount to be recovered upon some other cause of action. If the appellee had filed a counterclaim showing cause for the cancellation of the other notes, a different case would have been presented. But, whatever may be the rule in such a case, the judgment in the one at bar settles nothing more than the measure of recovery in the cause of action declared on. It does not conclude the appellant from maintaining an action on his other notes; nor, on the other hand, does it preclude the appellee from defending against them. The former cannot claim that, as he recovered \$300 on the note sued on in the former action, he is, by force of the judgment, entitled to recover a like sum on each of the other notes; nor can the latter justly claim that, as he succeeded in cutting down the amount of the recovery, he is entitled to have the judgment regarded as conclusively settling the question

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that the consideration for the indorsement of the four notes was no more than the sum recovered in that action. If the sum recovered in the former action was the entire consideration paid for the indorsement of the four notes, then there can be no recovery on the other three contracts of indorsement; but this is a defense altogether different from that of *res adjudicata*, as here relied on. It is a defense not to be made out by the mere production of the record of the former action, but to be made out by supplementing evidence of the former action and judgment with proof of the fact that all of the consideration was exhausted in the former recovery. The record of that recovery does not show that the sum allowed as damages exhausted the consideration for all the notes. Nothing more can be justly claimed for that record than that it shows that the defense prevailed to the extent of \$250, and that, although the plaintiff established a cause of action, he showed himself entitled to only the amount of damages awarded by the jury. The fact that the appellant recovered less than the sum his *prima facie* case gave him the right to does not settle his right of recovery upon distinct and independent causes of action not sued on in the former action. The appellee cannot affirm that the mere fact that the recovery was cut down entitles him to a presumption that his defense failed. It may well be that the jury found less than the appellant was entitled to recover, but this would give the appellee no cause of complaint, nor render the verdict ill, nor yet make it conclusive as to the other causes of action.—*Wolf v. Goodhue F. Ins. Co.*, 43 Barb. (N. Y.) 400, affirmed 41 N. Y. 620. In *Hargus v. Goodman*, 12 Ind. 629, it is shown that a judgment is not conclusive unless the point claimed to have been litigated was essential to the support of the judgment, and this principle must apply to a case like this, if to any, for the amount of recovery upon the note sued on might well be cut down without looking beyond to other and different notes. The case of *Clark v. Sammons*, 12 Iowa, 368, is in point, and illustrates the distinction we have endeavored to make between a total and a partial defense. In that case two notes were giv-

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en for personal property. To the complaint on the first note the defendant pleaded a breach of warranty and a failure of consideration; and in the action upon the second note it was held that the defense of failure of consideration might be pleaded. The court there said: "The plea of failure of consideration in the first suit applied solely to the matters then in issue, to the claim of plaintiff, as then pleaded." So it is here, for so far as concerned the amount of recovery the question in the former action was, how much is the appellant entitled to recover on the note in suit? All the jury determined was that he was entitled to recover the amount assessed in his favor. They did not and could not go outside of the issue to settle the amount of recovery on other independent causes of action.

"Suppose that the appellant has recovered the full amount claimed to be due on the note sued on, would the appellee have been precluded from pleading failure of consideration as to the notes not declared on in that action? Is it not perfectly plain that the judgment would have settled the measure of recovery as to that one note, and have left the question of the amount to be recovered upon the other notes to be disposed of in another action, or in other actions? If it be true that the judgment for the full amount would have settled the question only as to the one note, then it must also be true that the plaintiff might maintain an action on the other notes, and the defendant rightfully plead failure of consideration. If this be not correct, then the recovery by the plaintiff on one note must be held to conclusively settle his right to a recovery on all the other notes, and this conclusion is manifestly wrong for it might well be that the consideration recovered included the entire consideration for all of other notes. If it be granted that a recovery by the plaintiff settles not only the question as to the particular note, but also as to all the other notes, then the judgment in the former action, instead of barring the appellant, barred the appellee to the extent at least of the amount recovered, and this is, plainly enough, an erroneous conclusion. On the other

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hand, if the consideration recovered on the first note was only the proportion which the amount of the note bore to the entire consideration, the appellant would be unjustly deprived of his right if the former recovery should be held a bar. The only solution of the difficulty is to hold that where the defense prevails so far as to cut down damages, and does not overthrow the cause of action, there is no adjudication of the entire recovery, and the judgment is to be confined to the cause of action declared on in the suit wherein the judgment was rendered. The judgement is, of course, evidence, and, if it be shown by other evidence that it took up the consideration of all the notes, then the defendant must prevail. It is apparent that the judgment in this case does not estop both parties, except as to the one note sued on in the former action. It is evident, as we have seen, that it cannot be an estoppel against the appellee except as to the one note sued on, for, if it is, then it binds him to pay upon all the other notes the sum recovered on the one in suit. It is, we repeat, a mutual estoppel only as to the one note, and when its mutuality ends so does its effect as an estoppel. The parties are bound so far as the first note is concerned, but they are not concluded as to the other notes. The authorities recognize a difference between the effect of a judgment when pleaded as a bar to an action upon the instrument sued on in the first action, and another of the same series and founded upon the same transaction. In *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204, the court, in speaking of the position taken by counsel, said: "In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy. Its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been

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brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position.—*Cromwell v. County, etc.*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. This doctrine is carried very far,, quite as far, perhaps, as it is possible to do without encroaching upon the settled principles, in *Roberts v. Robeson*, 27 Ind. 454, wherein it was held that a judgment declaring an assignment void was only conclusive as to the particular property involved in that action. There is reason for the general rule, and it ought surely to apply to a case like this, where the only thing really settled in the former action was the plaintiff's right to recover a specified sum on the demand there sued on, and where, except as to the mere question of amount, all issues were decided in favor of the plaintiff. It is clear that in that case there was only a partial recovery, and therefore only a partial adjudication upon the entire transaction out of which the demand arose, and it would be a violation of settled principles to stretch that judgment so as to make it include claims not in litigation in that action. Estoppels are not to be inferred, and we are not at liberty to infer that the judgment in the former action settled the controversy so as to include notes not sued on. 'It is allowable,' says the supreme court of Massachusetts, 'to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn.'—*Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772. The conclusion that the whole subject of consideration was settled in the former action, so far from being an inevitable one from the judgment, is in truth an improbable one. The strong probability, if not the moral certainty, is that, with the single cause of action before them, the jury looked to nothing else, and the measure of damages adopted by them was adopted with exclusive reference

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to that one cause of action; in other words, that they regarded the proposition of the whole consideration due upon the note in suit to be the just measure of recovery on that one demand. In *Packet Company v. Sickles*, 5 Wall. (U. S.) 580, 18 L. Ed. 550, it was said, speaking of an estoppel by judgment, that it was conclusive if it appeared 'that the verdict could not have been rendered without deciding the particular matter.' In this case it is very plain that the damages awarded the appellant in the former action might have been awarded without deciding anything at all as to the other notes. We think a partial success upon a partial defense cannot be fairly regarded as making an estoppel as to demands not embraced in the action in which the judgment was rendered. The conclusion to which we are carried is that the judgment is conclusive as to the first note, but not as to the assignments not sued on in that action. It can no more be said that the judgment took up the whole consideration for the four contracts than that it applied the whole deduction on account of the failure of consideration to the one contract, leaving the consideration for the other three notes intact. It is impossible to say whether the whole consideration for the four assignments was included in the amount assessed by the jury in favor of the appellee, or whether the entire amount of the failure was deducted from the one sued on, thus leaving a full consideration for each of the other contracts. The only manner in which justice can be done these parties, and a safe precedent established, is to hold that the judgment settled the controversy upon the issue joined on the single cause of action declared on in the former action, and this is clearly the rule declared in the cases cited."

It would thus appear that the judgment in the former suit did not operate as a bar to the plaintiff's right to recover in the case at bar upon the last series of notes, and the demurrers to the special pleas were properly sustained. On the other hand, the judgment rendered in the former case for a portion of the consideration of the first series of notes did not estop the defendant from invoking the defense of "failure of consideration" as

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against the second series of notes, and the trial court erred in not sustaining defendant's demurrer to plaintiff's replication proceeding upon such a theory.

The rehearing is granted, and the judgment of the circuit court is reversed and the cause remanded.

HARALSON, TYSON, DOWDELL, SIMPSON, and DENSON,
JJ., concur.

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Action on Sales Contract.

(Decided June 30, 1906. 41 So. Rep. 675.)

1. *Appeal; Harmless Error; Rulings on Evidence.*—Where there was a controversy as to the balance due on a contract of sale, and the jury found with the defendant's contention, on appeal by defendant, error in the admissibility of evidence supporting plaintiff's claim was harmless.
2. *Evidence; Opinion of Witness; Principal and Agent; Authority of Agent.*—A witness who knows the facts may testify that the authority of a traveling salesman of a corporation was limited to taking orders subject to approval by the corporation.
3. *Sales; Contract; When Completed.*—A traveling salesman, authorized to take orders subject to approval, sold goods to a buyer indicated by an order specifying the goods and the price to be paid and signed by the salesman only. Held, the order did not constitute a contract in the absence of an acceptance by the manufacturer.
4. *Same.*—In April a traveling salesman, with authority to take orders subject to approval, sold a bill of goods to the buyer, which his principal approved and filed. During the following September the same salesman sold other goods to the same buyer, and made out a written order designating the goods and the price forwarded it to his principal, who held the order until November without indicating to the buyer whether it was accepted or rejected. Held, that the silence on the part of the principal, or manufacturer, did not constitute an acceptance of the order.
5. *Same.*—In November the buyer wrote to the manufacturer con-

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cerning the order, and the manufacturer replied declining the order at the price stated therein. Held, that the correspondence sufficiently showed a non-acceptance of the order.

6. *Customs and Usages; Knowledge of Customs; Presumption.*—It cannot be presumed that a manufacturer whose place of business was in North Carolina had knowledge of customs prevailing in one point in Alabama.
7. *Same; Evidence; Admissibility.*—As affecting the principal of salesmen, proof of a custom obtaining among such salesmen alone, is inadmissible.
8. *Principal and Agent; Power of Agent; Evidence as to Authority; Declaration of Agent.*—Whether or not the salesman said to the buyer that he was merely taking a bid from him, which would have to go to the house for acceptance or rejection, was incompetent as against the principal.

APPEAL from Mobile Circuit Court.

Heard before HON. SAMUEL D. BROWNE.

Action by Cates Chair Company against A. L. Gould. From a judgment for plaintiff, defendant appeals.

The defendant interposed several pleas—the first being the general issue; the second, plea of tender of \$33.42; the third, a plea of set-off for damages growing out of the breach of the contract between the parties in the sum of \$48.67; and the fourth was the plea of set-off for damages for breach of contract, expressed in somewhat different terms, except as to the amount of damages, coupled with it an offer or tender of the difference between the amount claimed to be due and the amount claimed as damages for breach of the contract, which is alleged to be \$33.42, and which sum was paid into court. The facts sufficiently appear in the opinion, except the order referred to, which is in words and figures as follows: "Order No.----- 9-2-1903. Cates Chair Co., Ship to A. L. Gould, at Mobile, Ala., How ship, ----- When, ----- Terms: 10 & 5 off 60. 30 doz. No. 25 chairs, \$6.75. 3 doz. No. 26 R. chairs, \$9.00. Ship 10 doz. chairs and 2 doz. rockers on order of 4-11, and 10 doz. chairs and 2 doz. rockers 30, 60, and 90 to complete this and back order. (Signed) J. L. Smathers." The other facts sufficiently appear in the opinion of the court.

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R. W. STOUTZ, for appellant.—If the extent of the authority of the salesman was to be questioned at all defendant's evidence of general usage or custom as to the authority of traveling salesmen should have been admitted.—*Kaufman, et al. v. Farley Mfg. Co.*, 78 Iowa, 679. The actual authority delegated to the agent is not material. We are concerned with the apparent scope of the authority of the agent.—*Montgomery Furn. Co. v. Hardaway*, 104 Ala. 100; *Wheeler v. McGuire*, 86 Ala. 402. The courts judicially know that a vast deal of the business of the country is transacted through traveling salesmen.—*Simon v. Johnson*, 101 Ala. 370.

One dealing with the agent or officer of the corporation within the scope of the apparent power of such agent or officer, is not affected by the secret instructions of the corporation or the secret limitations which may have been placed upon his power.—*Birmingham Co. v. Bank*, 99 Ala. 379; *Higman v. Camody*, 112 Ala. 467. The contract being in writing and purporting to be a contract on its face the principal was estopped to dispute the authority of the agent.—*Tobias v. Morris*, 126 Ala. 535. If the authority of the agent and its extent rests in parol then it becomes a question of fact for the jury when it is a disputed fact, and not a question of law for the court.—*Buist v. Eufaula Drug Co.*, 96 Ala. 292; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; *U. S. L. I. Co. v. Lesser*, 126 Ala. 568; *B. M. R. Co. v. T. C. I. & R. Co.*, 127 Ala. 137. Counsel discusses other assignments of error but cites no authority.

HAMILTON & THORNTON, for appellee.—The principle that a person dealing with an agent must know the extent of his authority, and this authority must be proved otherwise than by the declarations or acts of the agent applies in this case.—*Van Eppes v. Smith*, 21 Ala. 317; *Powell v. Henry*, 27 Ala. 612; *McMillan v. Wooten*, 80 Ala. 283; *Howe Co. v. Ashley*, 60 Ala. 496. While a general business custom or usage may be shown the custom of the particular locality cannot be.—*Simon v. Johnson*, 101 Ala. 368.

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DENSON, J.—There are many grounds in the assignment of errors, which, on account of undisputed facts in the case, it will not be necessary for us to consider. The plaintiff was a corporation in the state of North Carolina, doing business as a manufacturer and seller of chairs. It had in its employ one Smathers as a traveling salesman of its products. Smathers, in April, 1903, in the course of his employment as such salesman, took from the defendant, who was engaged in the furniture business in Mobile, Ala., an order for a bill of chairs amounting to \$270. This order stipulated that the chairs were to be shipped in installments. It was forwarded by Smathers to the plaintiff. It is conceded that the plaintiff accepted this order and made shipment on it of all the chairs stipulated for in it. It was also conceded by plaintiff that the defendant had, before the commencement of this suit, paid all that was to be paid on the order except \$90. The defendant contended that by reason of discounts agreed to be allowed he owed only \$81, and the verdict of the jury is in accord with this contention. So that, so far as the amount due on the plaintiff's claim is concerned, if there was error in the rulings of the court on the admissibility of evidence to support plaintiff's claim, certainly it was not prejudicial to the appellant.

But the defendant pleaded a set-off. His contention on the trial was that on the 2d day of September, 1903, he gave to Smathers, the salesman of plaintiff, an order for chairs; that the plaintiff received the order, but never shipped the chairs, and declined to do so. Defendant insisted that this order, when given to Smathers, was a complete contract, binding plaintiff to ship the chairs, and the plaintiff breached it. The defendant contends that, after Smathers received his last order, chairs such as were specified in the order advanced in price, and he, on account of plaintiff not shipping the chairs on the last order, was damaged in the sum of \$48.67; that being the difference between the price named in the order and the price when the order, according to his insistence, should have been filled. At the conclusion of defendant's evidence the court on motion of the plaintiff,

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excluded all of the evidence offered by the defendant, and at the request of the plaintiff in writing charged the jury, if they believed the evidence, they should find a verdict for the plaintiff. The question for consideration, in connection with defendant's contention, involves the authority of the salesman and its extent. The plaintiff's contention in this respect was, and is, that Smathers was only a soliciting agent, and that orders taken by him were never binding on it until they were approved and accepted by plaintiff. The witness Cates testified (and it was competent evidence under *Bensberg v. Harris*, 46 Mo. App. 404) that Smathers was plaintiff's traveling salesman, with authority to take orders on commission subject to plaintiff's approval. In the case of *Simon & Son v. Johnson*, 101 Ala. 368, 13 South. 491, one phase of the authority of a traveling salesman was considered and determined by this court; the precise question there determined being that a traveling salesman of merchandise, making sales by sample on a credit or for cash to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser.

The precise question presented by this record has not been determined by this court. In the case of *Clough v. Whitcomb*, an order was taken for goods by a salesman having authority similar to that with which the salesman in this case was clothed. The trial court charged the jury: "If Clark (the salesman) made the contract with the defendant for the goods, and the plaintiff agreed to give Clark a commission on said goods, then Clark was his agent to sell said goods." The appellate court, in holding the instruction bad, said: "A commission allowed to one who solicits orders upon sales effected through such orders does not constitute him or prove him to be an agent with authority to make absolute contracts of sale."—*Clough v. Whitcomb*, 105 Mass. 482; *Bensberg v. Harris*, 46 Mo. App. 404; *Finch v. Mansfield*, 97 Mass. 89; *Burbank v. McDuffee*, 65 Me. 135. So in this instance Smathers "did not sell the goods, or even contract to sell them." When the defend-

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ant had completed his transaction with Smathers, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiff could have refused to accept the order. Neither party had become bound by anything then done. The order of defendant was a mere proposal, to be accepted or not as the plaintiff might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*."—Benj. on Sales, §§ 40, 70; *Johnson v. Filkington*, 39. Wis. 62; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Bensberg v. Harris*, 46 Mo. App. 404; *Deane & Co. v. Everett*, 90 Iowa, 242, 57 N. W. 874; *McCormick Harvesting Co. v. Richardson*, (Iowa) 56 N. W. 682; *Stensgaard v. Smith*, (Minn.) 44 N. W. 669, 19 Am. St. Rep. 205; *Eskridge v. Glover*, 5 Stew. & P. 264, 26 Am. Dec. 344. In the light of the elementary principles and of the adjudged cases, it seems clear that the order or writing in question does not constitute a contract, in the absence of acceptance or of any action under it by the plaintiff. It does not purport to be a contract between the parties. "By it plaintiff was not obligated to do anything on its part. Plaintiff does not undertake, by the terms of the writing, to ship the chairs on the proposed terms. It is no more than a request by the salesman that the plaintiff should ship to defendant the goods named. It may be said to be an order, but it lacks an essential element of a contract—mutual assent. Being only a request or order, which required acceptance by plaintiff to give it the force of a contract, it follows, as has already been stated, that it might be withdrawn or countermanded at any time prior to its being so accepted."

We do not say, however, that the acceptance must be a formal one. It is insisted that, the plaintiff having accepted and filled the previous order given to the plaintiff's salesman and having held the last order from some time in the early part of September until November 12th, the plaintiff must be held to have accepted the or-

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der, and that it is estopped from urging non acceptance. Estoppels must be mutual, or they are not effectual. As we have seen, there is no time, from the time such an order is received until it is accepted, that the person giving the order cannot countermand it. It is plain that mere silence on the part of the plaintiff after receiving the order, without any act tending to show an acceptance, would not cut off the right of defendant to countermand. If not, then it cannot, with show of reason, be insisted that silence alone should constitute an acceptance of the order on the part of the plaintiff. Plaintiff said nothing about the order, and did nothing with regard to it, until on the 12th of November, 1903, in reply to a letter of the defendant written on the 10th of that month, plaintiff wrote the defendant as follows: "Referring to your order of 9-2, we find it reads 10 plus 5 off in 60 days, for ten doz. shipments, which we must in justice to ourselves decline, as this would not give us cost of production on this particular number, being our cheapest chair. Number 25 is worth to-day \$7.25 per doz., as you will see by the enclosed price list. However, if you wish the chairs, we are willing to accept the order at \$6.75 and \$9.00 per dozen, subject to 10 per cent. for cash in 10 days, or 60 days net. Please advise your wishes in the matter, and oblige." Having the right to decline acceptance of the order it would seem that it would be a matter of no importance upon what ground the declination was placed, or whether any ground was stated, the letter accentuates the fact that plaintiff had not favorably considered the order, and this letter, written in answer to defendant's, makes positive announcement to the defendant of that fact, and we can get no more than that out of it.

The court properly excluded the evidence of custom that was offered by the defendant. Without conceding that evidence of custom would be competent to supply mutuality, the plaintiff in this instance was domiciled in North Carolina, and it cannot be presumed that it had knowledge of the custom in Mobile, Ala.; and this on the face of the evidence offered was the limit of the territory of the custom. Moreover, the custom offered

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to be proved was a custom amongst traveling salesmen, and did not embrace the principal of such salesman.—*Simon & Son v. Johnson*, 101 Ala. 368, 13 South. 491; *German-American Insurance Co. v. Commercial Fire Insurance Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; *Deane & Co. v. Everett*, 90 Iowa, 242, 57 N. W. 874. Whether Smathers told defendant or not, at the time he took the order, that he was merely taking a bid from him, and he would have to send it on to the house for acceptance or rejection, was not competent evidence against the plaintiff.

It results from the foregoing considerations that no error prejudicial to the defendant was committed by the trial court, and the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HABALSON and SIMPSON, JJ.,
concur.

Baker v. Hutchinson.

Trover.

(Decided June 6th, 1906. 41 So. Rep. 809.)

1. *Chattel Mortgages; Conversion; Wrongful Taking; Complaint.*—A count in a complaint which alleges that defendant took possession of and converted to his own use cotton raised by a third person who had given plaintiff a mortgage on such cotton, sufficiently shows plaintiff's lien and defendant's wrongful taking of the lien property.
2. *Same; Interest of Plaintiff; Pleading.*—Where the complaint alleges that plaintiff had a lien on the cotton converted, by virtue of a mortgage executed to him by a third person, who raised the cotton so converted; that the mortgage was recorded in a certain book, in the probate office, on a certain date, in the county where defendant took the cotton, sufficiently shows plaintiff's lien and its destruction by defendant.
3. *Fraud; Pleading.*—The facts constituting the fraud must be stated, and a general averment of fraud is insufficient.
4. *Chattel Mortgages; Conversion; Defense of Prior Lien; Pleadings.*
A plea setting up as a defense that the property converted

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was taken by defendant by virtue of a mortgage executed to defendant by the owner of the property, is subject to demurrer for not stating facts to show that such mortgage constituted a prior lien or superior title to the one relied on by the plaintiff.

5. *Same; Release of Property; Pleadings.*—A plea to an action for destroying the mortgage lien of plaintiff which avers that when the mortgage was executed to plaintiff it was agreed between plaintiff and his mortgagor that enough of the crop so mortgaged should be disposed of by the mortgagor to enable him to procure supplies to make the crop, and that any cotton defendant may have obtained from the mortgagor was to pay for supplies to make the crop, furnished mortgagor by defendant, and that such supplies were necessary to enable mortgagor to make the crop, was not sufficient, as no facts are stated showing a release by the mortgagee of the particular cotton alleged to have been converted, in accordance with the agreement.
6. *Same; Interest of Plaintiff; Evidence.*—The mortgage and secured notes were properly introduced as links in the chain of plaintiff's title, and as showing the amounts due on them.
7. *Same; Variance Between Mortgage and Notes.*—The fact that the wife's name did not appear on the notes, as was stated in the mortgage, created no such variance as would impair the mortgage as a security for the debts of the actual maker.
8. *Same; Ownership of Chattels; Evidence.*—The ownership of the land on which the cotton was grown by the mortgagor, when there is nothing shown to the contrary, is sufficiently proven by the mortgage, dated 1902, being given on the crop of 1903, and evidence of plaintiff that the mortgagor lived in 1903 on the land sold him by plaintiff.
9. *Action; Trover and Case; Waiver of Tort.*—The owner of the lien does not waive his right to sue in trover or case for conversion, or the destruction of his lien, by requesting the one who has converted the lien chattels to pay him the amount realized therefrom.
10. *Trover and Case; Damages; Evidence.*—The fact that three bales of cotton were converted by defendant, together with proof of the value of cotton per pound is sufficient to authorize a verdict for more than nominal damages, without proof of the weight of each bale.

APPEAL from Tallapoosa Circuit Court.
Heard before HON. S. L. BREWER.

[Baker v. Hutchinson.]

Action by Columbus Hutchinson against D. W. Baker. Judgment for plaintiff. Defendant appeals.

The complaint was in the following language: "The plaintiff claims of the defendant the sum of \$200 damages for the wrongful conversion by him, on or about the 15th day of October, 1903, of the following personal property, to-wit: Three bales of lint cotton, the property of plaintiff. (2) The plaintiff further claims of the defendant the sum of \$200 damages for this: that on or about the 15th day of October, 1903, the defendant did take possession of and converted to his own use three bales of lint cotton, which was raised by or caused to be raised by W. T. Thomaston in Tallapoosa county, Ala., during the year 1903; and the plaintiff alleges that he has a lien on said cotton by virtue of a mortgage executed by said Thomaston to this plaintiff on the 8th day of December, 1902, and duly recorded in the office of the judge of probate of Tallapoosa county, the county where said property was at the time the same was received by the defendant, which said mortgage was recorded on the 10th day of December, 1902, in book 104, p. 327; and the plaintiff alleges that with notice of said lien the defendant took possession of said property and has sold or otherwise disposed of the same to his own use and benefit, so that plaintiff cannot enforce his lien on said cotton."

Demurrers were assigned to the second count as follows: "Said count fails to show that the defendant wrongfully took possession of the property described therein. (2) Said count fails to show that the defendant did wrongfully take possession of and wrongfully convert to his own use three bales of lint cotton, which was raised or caused to be raised by W. T. Thomaston in Tallapoosa county, Ala., during the year 1903. (3) Said count states a mere conclusion of the pleader, where it says that plaintiff had a lien by virtue of the mortgage, when said mortgage nor the substance thereof is not set out. (4) The statements or averments fail to show that plaintiff had a lien on said cotton. (5) Said count fails to show that the mortgage referred to therein constituted a lien on said three bales of cotton.

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(6) Said count is too vague and indefinite for defendant to join issue on. (7) For aught that appears, the taking of said three bales of cotton was rightfully done by defendant. (8) Said count does not show with sufficient certainty what the defendant did with the cotton, and fails to show how and in what manner defendant disposed of the cotton. * * * (10) It is stated as a mere conclusion that plaintiff had a lien on the cotton." These demurrers were overruled.

The defendant filed the following plea: "Plea 3. The defendant says the mortgage referred to in the second count of the complaint is void against this defendant, in this: that the said Thomaston was indebted to this defendant at the time of the execution of the mortgage, and that said mortgage was given for the purpose of hindering, delaying, or defrauding this defendant, and that the plaintiff participated in said fraud." Demurrers were interposed to this plea as follows: "Because said plea is too indefinite to advise the plaintiff what he is called upon to defend. Said plea fails to allege that the plaintiff knew of or took part in the fraudulent giving or taking of the mortgage. Said plea does not allege that the plaintiff had any connection with the fraud therein charged. Because the vendee cannot set up the fraud in the giving of the paper here set out. The plea fails to set out the facts which constitute the fraud." These demurrers were sustained and defendant filed plea 4: "Defendant says further, that if it got the cotton and property described in said complaint, and converted it to its own use, it was under and by virtue of the authority conferred in a mortgage executed by said W. T. Thomaston to this defendant, and defendant avers that said mortgage conveyed to this defendant the legal title to the property, and that defendant was therefore justified in converting said property to his own use." Demurrers were interposed to this plea as follows: "The same does not show that defendant's mortgage was executed prior to the mortgage of plaintiff described in said complaint. Because said plea does not sufficiently describe the claim asserted to the property by the defendant." These demurrers were

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sustained. Defendant filed plea 5: "At the time the said W. T. Thomaston executed the mortgage described in the complaint, it was agreed between said Thomaston and the plaintiff that enough of the crop grown by said Thomaston should be disposed of by said Thomaston to enable him to secure supplies to make a crop during the year 1903, and defendant says that any cotton that he got from said Thomaston was to pay for supplies to make said crop furnished said Thomaston by defendant, and that said amount of supplies were necessary to be furnished said Thomaston to make his crop." Plaintiff demurred to plea 5 as follows: "Because said plea fails to allege that the particular cotton described in the complaint and alleged to have been converted was released by said transaction set out and described in said plea 5."

D. H. RIDDLE, for appellant.—The second count was insufficient and the demurrers thereto should have been sustained.—*Jones v. Webster*, 48 Ala. 109; *Fields v. Karter*, 121 Ala. 329; *Jones' Chattel Mortgage*, § 140. The demurrers to plea 3 were general demurrers and should have been overruled for that reason.—104 Ala. 335; 3 Brick. 389. The mortgage and notes should have been excluded.—*Patterson v. Irvin*, 132 Ala. 557.

GEO. A. SORRELL, for appellee.—Plea 3 was a plea setting up fraud and did not aver facts showing the fraud.—*McDonald v. Pearson*, 114 Ala. 630; *Reynolds v. Coal Co.*, 100 Ala. 296; *Loucheimer v. Bank*, 98 Ala. 521. Counsel discuss other issues but cite no authorities.

WEAKLY, C. J.—The second count of the complaint was not subject to the demurrer interposed. It was sufficiently definite under our liberal rules of pleading, and made a case of liability for the destruction of plaintiff's alleged lien, growing out of the mortgage. It was not necessary to allege the evidential facts which would upon the trial, be relied on to establish the existence of the lien. There was no necessity for more specific averments.

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The demurrer to the third plea, as amended, was properly sustained. The plea did not allege the facts out of which the fraud was supposed to arise. When fraud is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated. A mere general averment of fraud without such facts is insufficient.—*Reynolds v. Excelsior Coal Co.*, 100 Ala. 296, 14 South. 573.

The fourth plea did not show that the mortgage relied on by the defendant was prior or superior to that of the plaintiff, and, as the demurrer pointed out this vice, it was properly sustained.

The fifth plea was lacking in averments to show a release of the cotton in question in accordance with the agreement alleged to have been made between the mortgagor, Thomaston, and the plaintiff at the time of the execution of the mortgage, and was defective.

The plaintiff had the right to introduce the mortgage and notes as links in his chain of evidence to support the complaint and to prove how much was due thereon at the commencement of the suit. Evidence that the sum of \$300 was owing on the notes and mortgage shows that the mortgage was supported by consideration. The fact that the wife's name did not appear on the notes as the mortgage recited would not impair the mortgage as a valid security for the notes as the obligation of the husband.

It is true that no witness stated in so many words that Thomaston owned the lands on which the cotton was grown at the time the mortgage was executed, yet, taking the date and the recitals of the mortgage in connection with the plaintiff's testimony that Thomaston lived in 1903 on the place sold him by the plaintiff and grew the cotton on that place, the only rational interpretation to be placed upon the evidence, in the absence of anything to the contrary, is that Thomaston bought the place prior to 1903, and that the purchase was made either prior to or contemporaneous with the execution by him of the mortgage to the plaintiff on December 8, 1902. No just inference could be drawn which would

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authorize a jury to find that the plaintiff took a mortgage upon his own property from Thomaston to secure the latter's debt.

The plaintiff waived no right to sue in this action by calling on defendant to pay him the amount realized on the cotton. We think that evidence of a conversion by defendant of three bales of cotton, its value per pound being shown, authorized the jury, without proof of the weight of each bale, to find that plaintiff had sustained more than nominal damages, and hence the charge limiting the recovery to nominal damages, requested by defendant, was rightly refused.

There was no conflict in the evidence, and the circuit court committed no error in giving the affirmative charge for the plaintiff.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

Smith v. Hilton.

Trover Against Constable.

(Decided June 30th, 1906. 41 So. Rep. 747.)

1. *Justices of the Peace; Qualification; Void Acts.*—A justice of the peace whose term of office expired in August 1904, and who failed to give an official bond as required by General Acts 1903, p. 238, thus extending his term until the next general election, vacated the office, and an attachment issued by him after Sept. 10, 1904, was void.
2. *Sheriff's and Constables; Wrongful Attachments; Void Writ no Defense.*—A constable, under a void writ of attachment, levied upon certain property and delivered the same to plaintiff's landlord, who sold the property and applied the proceeds to an alleged indebtedness of plaintiff for rent. Held, even if plaintiff was indebted to his landlord in an amount exceeding the value of the cotton, such fact constituted no defense to an action of conversion against the constable.

[Smith v. Hilton.]

APPEAL from Geneva Circuit Court.

Heard before HON. H. A. PEARCE.

This is an action by A. H. Hilton against W. H. Smith, a constable, for the conversion by him of certain cotton alleged to belong to plaintiff. The facts necessary to an understanding of the opinion sufficiently appear therein.

ESPY & FARMER, for appellant.—The case of *Bodman v. Grisham*, 111 Ala. 194, is relied on by appellant to support his contention that evidence of the fact that appellee owed Blackmon, his landlord, more than the proceeds of the cotton as rent and that it was so applied, was admissible and a complete defense to the action.

R. P. COLEMAN, for appellee.—Blackmon had no right to replevy.—§ 555, code 1896; *Woolfork v. Ingram*, 53 Ala. 11. Testimony as to the application of the proceeds of the cotton to pay the landlord was inadmissible.—*Keith v. Hamm*, 89 Ala. 590; *Byrd v. Womack*, 69 Ala. 390, and cases therein cited.

HARALSON, J.—It seems to be admitted on both sides, that C. A. Hardwick, who issued the attachment in favor of K. Blackmon against the plaintiff in this case, A. H. Hilton, was not in fact a justice of the peace, at the time he issued such attachment. He had been a justice, whose term of office had expired, and he failed to give an official bond by the 10th of September, 1904, as required by act approved 17th September, 1903 (Gen. Acts 1903, p. 238), which act provides, that the failure to execute such bond by that date, vacated the office.

The attachment was issued, therefore, by a person not authorized, and it was of no more legal effect than if it had been issued by a private individual. The writ that was issued was void, and would not support a levy. On the motion of plaintiff, said Hardwick dismissed said attachment, as is stated in the bill of exceptions. This means nothing more nor less, than that said Hardwick repudiated said attachment, as having been inadvert-

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ently and improperly issued by him, and that he would have nothing more to do with the matter.

Before this action on the part of said Hardwick, the constable, W. H. Smith, into whose hands the writ of attachment went, turned the bale of cotton, on which he had levied the writ, in to the hands of K. Blackmon, who claimed an interest in the cotton levied on, upon Blackmon giving him an indemnifying bond. The contention between the plaintiff and Blackmon was, as appears by the bill of exceptions, that plaintiff had rented land from Blackmon for the year 1904, at a stated rent, and made a crop on it, for which, as he alleges, he paid Blackmon, \$60, which was all that he owed for rent of the land. Blackmon, on the other hand, claimed that plaintiff had not paid all his rent, but owed him more on that account, than the bale of cotton was worth. Therefore, Blackmon sold the bale of cotton and applied the proceeds, as he contends, towards the payment of the rent still owing by plaintiff to him.

Thereupon, plaintiff commenced this action in trover against W. H. Smith, the constable, for the conversion of said bale of cotton. The defendant filed the plea of not guilty, and another plea, which is not set out in the record proper, nor in the bill of exceptions, which plea was, on motion of plaintiff, stricken out. Whether properly or improperly stricken, we are unable, and are not called on to adjudge, since we are not informed of the nature and character of said plea. The case was tried on the plea of the general issue, and the court gave the general charge for the plaintiff. It also instructed the jury, that the measure of plaintiff's damages would be the value of the cotton at the time of the conversion of the same with interest from date of the conversion to the time of the trial. These charges are assigned as error, and only the first is insisted on in argument.

As we have stated, the contention of defendant is, that if plaintiff was indebted to Blackmon, his landlord, for a balance due on rents for 1904, and Blackmon, after defendant delivered the cotton to him, sold it, and applied the proceeds to that indebtedness, this plaintiff could not recover in the case, if the value of

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the cotton sold did not exceed plaintiff's alleged indebtedness to Blackmon. This is tantamount to saying, that if A. owes B. a debt the latter has the legal right to take possession of A.'s personal property, without his consent and dispose of it, and apply the proceeds of his sale to his debt without liability therefor.

In *Belser v. Youngblood*, 103 Ala. 545, 15 South. 863, we held, that when a tenant who has executed a mortgage on the crops grown on leased premises, sells a portion of such crops without instruction or authority of his landlord, the purchaser is liable in trover to the mortgagee, though the proceeds of the sale were paid to the landlord in payment of rent due him. It was there said, that a different rule, would sanction a dangerous precedent, and be contrary to the former rulings of the court.—*Keith v. Ham*, 89 Ala. 590, 7 Eouth. 234; *Bird v. Womack*, 69 Ala. 392; *Higgins v. Whitney*, 24 Wend. 380. In *Bird v. Womack*, *supra*, which was an action of trespass de bonis asportatis, it was held, that if the defendant, being a mere trespasser, has applied the property seized by him to the plaintiff's use, but without authority, and without plaintiff's consent, express or implied, this fact is not available to him in mitigation of damages, although the use to which the property was applied, was the satisfaction of a lien which a third party held thereon. In the course of the opinion it was said: "If defendants generally, were permitted to invoke such a defense, they would be encouraged in pragmatical interferences with the property of third persons, and, perhaps, to such an extent as frequently to endanger the public peace. It is carrying the rule sufficiently far to accord this right of recoupment to parties who holds liens on property, which is the subject of conversion or trespass, and we are not inclined to extend its operation further, despite the hardship of the principle in many cases."

We find no error in the record, and the judgment below is affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

[Smiley v. Hooper, *et al.*]**Smiley v. Hooper, *et al.****Trover.*

(Decided June 7th, 1906. 41 So. Rep. 660.)

1. *Witnesses; Cross Examination; Discretion of Trial Court.*—It was largely within the discretion of the trial court as to what latitude it would allow upon cross examination, to test the knowledge, accuracy of memory, and truthfulness, and as controverting the facts deposed to by a witness, who on his direct examination, testified that he had purchased the wood, alleged to have been converted, for the plaintiff as his agent.
2. *Evidence; Relevancy; Matters Explanatory of Facts in Evidence.*—The defendants having raised the issue as to whether plaintiff bought the wood, alleged to have been converted, for himself, or as agent for a certain Iron Co., it was competent for plaintiff to show that when he settled with the Iron Co., no credit was allowed him for wood not delivered, as showing the nature of the transactions between plaintiff and the Iron Co.
3. *Same; Hearsay.*—It was incompetent to show by witness declarations alleged to have been made by the superintendent of a certain company that S. in purchasing certain wood, was acting for the corporation, although plaintiff introduced evidence tending to show that S. purchased the wood, alleged to have been converted, as agent for plaintiff.
4. *Execution; Wrongful Levy; Action; Evidence.*—The issue being whether the wood, which was levied on under execution against another, was the property of the plaintiff, it appearing that the wood had been purchased by S. whom plaintiff insisted, was his agent, evidence as to contracts made by S. with other persons, and the marks placed by S. on wood bought for other parties, was admissible.
5. *Same; Defenses.*—In an action against the sheriff and another for the wrongful conversion of certain wood, by levy and sale under execution against another than plaintiff, proof that plaintiff purchased the wood as the agent of another will defeat recovery, if believed.
6. *Same; Instructions.*—An instruction asserting that unless the jury believed from the evidence that the legal title to the wood was in plaintiff, he could not recover, was correct, in an action for trover.

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7. *Principal and Agent; Existence of Relation; Evidence; Declarations of Agent.*—The existence of the relation of principal and agent is not shown by the mere declaration of the agent.
8. *Trial; Instructions; Sufficiency of Evidence.*—It being sufficient, in a civil case, if the evidence reasonably satisfies the jury of the truth of the allegations, a charge requiring that they be convinced with "reasonable certainty by credible testimony" is erroneous, as requiring a too high degree of proof.
9. *Sales; Right to Sell; Seller's Title.*—Where one cut wood under a contract with a corporation, under which the wood did not become the property of the corporation until delivered at a certain place, a sale but such one to another before shipping the wood to that certain place, passed title to the wood to the purchaser.

APPEAL from Marshall Circuit Court.

Heard before HON. W. W. HARALSON.

This was an action against Hooper and the sheriff brought by plaintiff for the conversion of certain wood alleged to be the property of the plaintiff. Hooper had a judgment against one Entrican, and procured execution to be issued on it which execution was levied upon certain wood as the property of Entrican. The wood was sold under said execution. The evidence tended to show that Stewart, as the agent of the plaintiff, had bought this wood from Entrican and other parties, and had paid them for the same, and it had been delivered before the levy of the execution. The court permitted the witness Malone to state, over the objection of the plaintiff, that in the fall of 1902 Entrican tried to employ him to haul some wood, and told him that he would have to wait for his pay, and that he had to ship his wood to Attalla in order to get pay for it, and that at that time Entrican had hauled some wood for the railroad. The witness Coleman was permitted to testify that he had a conversation with McClane about Stewart, and that McClane said that he was the agent of the Eagle Iron Company, and was buying wood for the Eagle Iron Company, along the line of the Nashville, Chattanooga & St. Louis Ry., and that McClane said that Stewart was authorized to buy wood and pay for it, and that he was authorized to make contracts for the company; also to

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state that witness was in the employ of the Eagle Iron Company; also that Stewart said he was buying wood for the Eagle Iron Company when he made a contract for wood; also that witness and Stewart worked together; also that he had a contract with the Eagle Iron Company, made with Stewart, and that McClane said a contract made with Stewart for the Eagle Iron Company was good. Witness Bohanan was permitted to testify over the objection of the plaintiff that he had never heard McClane say that Stewart was representing Smiley. McCord was permitted to testify to practically the same state of facts as the witness Coleman.

The court, at the request of the defendant, gave the following written charges: "(1) Before there can be a recovery by the plaintiff, he must prove with reasonable certainty by credible testimony that the wood was his property. (2) The court charges the jury that, if the wood sued for was cut and put on the railroad by Entrican under the written contract made by him and McClane on October 5, 1902, then you must find for the defendants, and it would make no difference in that case, if it be a fact, that Smiley, or Stewart, or the Eagle Iron Company had paid to Entrican \$1.50 per cord on the oak wood and \$1.25 per cord on the pine wood. (3) The court charges the jury that if Stewart was the agent of the Eagle Iron Company, and bought the wood sued for as such, then you must find for the defendant. (4) Agency may be proven by circumstances, and, if the evidence reasonably convinces you that Stewart was the agent of the Eagle Iron Company in the purchase of the wood in question, then your verdict must be for the defendant. (5) The court charges the jury that, while an agent may purchase property for an undisclosed principal, yet if, when he makes the purchase, he represents that he is the agent of a certain person, then the law presumes that such contract is the contract of that person; and, if it is claimed that it is in fact the contract of some other person, the burden of proving this is on the party so claiming. (6) Unless you are reasonably satisfied from the

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evidence that the legal title to the wood in question is in Smiley, you must find for the defendant."

JOHN A. LUSK, for appellant.—The following propositions of law and the authorities cited will sustain the contention of the appellant as to the several matters set out in the assignment of errors. Stewart's agency for the Eagle Iron Co. could not be proven by proving the declarations of McClane or himself, unless it was shown that they had either an express or an implied authority to make such declaration, or that it was a part of the *res gestae*, and about a matter in which he had authority to act.—Abbott's Trial Brief, p. 128; *Hirsch v. Oliver*, 91 Ga. 554; 4 Mayfield's Dig. 550, § 593; 3 Brickell Dig. 25, § 108; 4 Mayfield's Dig. 526, § 80; 1 Elliott's Ev. §§ 552, 451; 2 Greenleaf on Ev. (16 Ed.) § 63.

Statements of the agent subsequent to the transaction in question are not evidence against the principal.—4 Mayfield's Dig. 527, § 95; 3 Stewart, 18; 5 Mayfield's Dig. 777, § 24; 3 Brick. Dig. p. 423, §§ 248-251.

To render admissions or declarations of an alleged agent admissible as evidence against an alleged principal they must be contemporaneous with and explanatory of the acts and within the scope of the authority of the supposed agent and while in the execution of the act of agency forming the *res gestae*.—4 Mayfield's Dig. 527, § 92; also 549, § 572; 72 Ala. 112; 3 Brick. Dig. p. 25, § 108.

That the plaintiff or his agent did or omitted to do a certain thing with other and different parties than the defendants or the person through whom the defendants claim to derive title and right to the wood in question is not evidence that plaintiff or his agent did the same thing with the defendants' source of title.—1 Elliott on Ev. § 159; Abbott's Trial Brief, 281; 2 So. Rep. Dig. 1003, § 31; *Berzell v. Maas*, 116 Ala. 68.

STREET & ISBELL, for appellee.—It was without dispute that the property at one time belonged to Entrican. It was contended in the first instance by defendants that the title had never passed out of Entrican; that the

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wood was gotten out by Entrican under a written contract between himself and one McLane, superintendent of "The Eagle Iron Co.," and which is set out in the record. It is clear that if this was the contract the title to the wood was still in Entrican.—*McFadden v. Henderson*, 128 Ala. 221; *Foley v. Felrath*, 98 Ala. 176; 24 Am. & Eng. Ency. Law (2nd Ed.) p. 1149; Benj. on Sales (Bennett's Ed.), p. 652.

It is claimed, however, by plaintiff, that this written contract, was abandoned by Entrican, and that he made a new contract for the sale of the wood to one Stewart as agent for plaintiff. The defendants contended, if this written contract was rescinded, or modified it was by agreement with said Stewart, as agent of "The Eagle Iron Co." Whether Stewart was agent of plaintiff, or whether he was agent of "The Eagle Iron Co.," was one of the chief controversies at the trial. Upon this question much testimony was offered by defendants to which exceptions were reserved. It consisted largely of evidence of declarations made by both Stewart and the superintendent of the Eagle Iron Co., that Stewart was the agent of the said company, and of contracts made by Stewart in the company's name. These declarations and acts were made at the time of the transaction of the matters to which they related, and were therefore a part of the *res gestae*, and were admissible not only against the party making the declarations, but against the world. We submit that all the rulings of the court of this character are justified by the principles declared in the following authorities: 1 Am. & Eng. Ency. Law (2nd Ed.) p. 960, 965, 969; *Tenn. River Nav. Co. v. Kavanaugh*, 101 Ala. 1; *Reynolds v. Collins*, 78 Ala. 94; Abbott's Civil Trial Brief (2nd Ed.) p. 343; 1 Green. on Evidence, §§ 108-114.

SIMPSON, J.—This was an action of trover for the conversion of 200 cords of wood, brought by the appellant (as plaintiff) against the appellees (defendants), being the plaintiff in execution and the sheriff. The defendant pleaded justification; the supposed act of conversion being the levy on the wood under an execution

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against one Entrican. There are 29 exceptions to questions to the witness Stewart and to the overruling of motions to exclude the answers to the same. These were all asked by the defendant on cross-examination. The witness professed to have bought the wood for Smiley, the plaintiff, and the defendant was evidently trying to test the witness as to his accuracy, his recollection, or his truthfulness, and controverting the fact that the wood was bought for Smiley and was his property. The law allows great latitude in cross-examination for these purposes, and it is a matter which rests largely in the discretion of the trial court as to the extent to which the cross-examination may be allowed. We cannot see that there was any abuse of the discretion by the trial judge in regard to these questions and answers.—*A. G. Rhodes Furniture Co. v. Weeden & Dent*, 108 Ala. 252, 257, 258, 19 South. 318; *Tobias v. Treist*, 103 Ala. 664, 15 South. 914; *Noblin v. State*, 100 Ala. 13, 14 South. 767. The same principles apply to assignments of error numbered from 30 to 38, inclusive, relating to the cross-examination of the witness Entrican; also to assignments from 39 to 44, inclusive, relating to the cross-examination of the witness Wildman and the plaintiff.

Referring to the forty-fifth assignment, the plaintiff had testified in his own behalf that he was furnishing the wood which he bought to the Eagle Iron Company, that they paid him always just 10 cents per cord more than he paid for the wood, and when they notified him to put down the price of the wood he did so, etc. The plaintiff then offered to prove by him that when he settled with said company, and was charged by them with all the money received by them, and credited with wood, "no deduction or credit was made or allowed to him on account of the wood which was not delivered." The defendant objected to this testimony, and the court sustained the objection and excluded the testimony. In this the court erred. The evident tendency of questions allowed to the defendant on cross-examination as to the transactions between the plaintiff and the Eagle Iron Company was to raise the question whether or not plaintiff was simply acting as the agent of that company in

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purchasing the timber, so that said company was the owner of the timber, and the matter here proposed to be proved by the plaintiff was relevant to show what the real transaction was between them, as going to show who was the owner of the wood, and should have been allowed, in view of the evidence already admitted.

The objections of the plaintiff to the several questions to the witness Coleman, and motions to exclude the answers, should have been sustained. It was not competent to prove who Stewart was representing by what McClane, the superintendent of the Eagle Iron Co., said. This was clearly hearsay testimony. The same is true with regard to the statements by the witness McCord as to what McClane said. The contracts made by Stewart with other parties, and as to the marks placed by him on the wood bought for other parties, were properly admitted as having some relevancy as to the question whose wood it was that was levied on. The fact that Entrican had hauled some wood to the railroad was relevant, but his statements made to the witness Malone should have been excluded. There was error, also, in allowing the witness Bohanan, over the objection of plaintiff, to relate what McClane said about whom Stewart represented.

Charge 1, given at the request of the defendant, exacts too high a degree of proof. It is sufficient if the evidence reasonably satisfies the jury.—*Moore v. Heineke*, 119 Ala. 629, 632, 640, 24 South. 374. The court erred in giving charge 2, on request of the defendant. According to the contract therein referred to, the wood purchased by Entrican for the Eagle Iron Company would not become the property of that company until delivered "f. o. b. cars" at Attalla, Ala., for them, so that, though Entrican may have cut it and put it on the railroad under that contract, yet, if he sold it to Smiley before shipping it to the said company, it was Smiley's wood.

Charges 3 and 4, requested by defendant, were properly given. The burden being on the plaintiff to show that the wood sued for belonged to him, proof that it was bought for another party would defeat his recovery.

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Charge 5, given on the request of the defendant, should have been refused. It cannot be said that, because a party purchasing property states that he is buying for another party, the law presumes that the contract is the contract of that party. Agency cannot be proven by the mere statement of the agent.

Charge 6 was properly given on request of the defendant; the burden being on the plaintiff to prove that he was the owner of the property for the conversion of which the suit was brought.

The judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

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Trover.

(Decided June 14th, 1906. 41 So. Rep. 664.)

1. *Trover; Right of Action; Right of Possession.*—In order to recover in an action of trover, the right to property, general or special, and possession, or immediate right of possession, must be in the plaintiff at the time of the conversation.
2. *Same; Complaint; Allegations; Sufficiency.*—In an action for the conversion of water, an allegation that plaintiff put the water into a tank belonging to another railroad, pursuant to a contract with such road binding plaintiff to furnish water to such railroad for its exclusive use, and that defendant took the water and converted it to its own use, sufficiently shows ownership in plaintiff and plaintiff's possession at the time of the conversion.
3. *Election of Remedies; Grounds.*—The party must have two actual inconsistent remedies to make a case for the application of election of remedies.
4. *Money Received; Conversation; Waiver of Tort.*—Until there has been a sale of the property converted by the tortfeasor, the owner of the property cannot waive the tort and sue for money had and received.

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5. *Trover; Pleas; Defects; Election to Waive Tort; Sufficiency.*—As an answer to a complaint in trover, a plea which alleges that the same plaintiff had previously instituted suit in assumpsit against this defendant, in which it treated defendant as a purchaser of the property alleged to have been converted, but which fails to allege a sale of the property by defendant before the institution of the assumpsit action, is fatally defective, as one may not recover for money had and received, based upon a conversion, unless there has been a sale of the property by the wrongdoer.
6. *Same; Action; Pleading; Evidence.*—It was permissible to introduce the summons and complaint in assumpsit in support of the plea of the institution of the suit in assumpsit before the bringing of the action of trover, as issue was joined on such plea.
7. *Same; Right of Action.*—Under a contract made by the city to furnish water to another railroad for its exclusive use, pursuant to which it furnished the water, which defendant took and converted to its own use, paying the other railroad therefor, the city had the right to maintain an action of trover against defendant for the water so converted.
8. *Appeal; Ruling on Demurrers; Presumptions.*—This court, on appeal, will presume demurrers to have been abandoned where the record fails to show a ruling of the trial court on demurrer to pleas.

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Action by the city of Attalla against the Southern Railway Company. From a judgment for plaintiff, defendant appeals.

This was an action brought by the city of Attalla against the Southern Railroad Company for water alleged to have been taken by said railroad company from the tanks of the Alabama Great Southern Railroad Company, which water had been placed in said tank by the city for the use of said Alabama Great Southern Railroad Company only. There were three counts in the complaint. The first count alleged the wrongful taking of 50,000,000 gallons of water, and damages are laid in the sum of \$3,000.00. The second count alleged the conversion of 50,000,000 gallons of water. The third count sets up the contract between the city of Attalla and the Alabama Great South-

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ern Railroad Company to furnish said railroad company with water for its exclusive use, the erection of tanks by the Alabama Great Southern Railroad Company for the reception of this water, and the taking therefrom by the Southern Railroad of 50,000 gallons per day for a period from the 1st day of October, 1899, to the 1st day of March, 1903, and a failure on the part of said Southern Railroad to pay for the same. Demurrers were interposed to the complaint, and overruled.

The defendant filed two pleas of the general issue, and the following special plea: "(3) Further answering the complaint, defendant says that the plaintiff, with full knowledge that defendant had taken or drawn said water from said tank and pipe and used and consumed the same, as alleged in the complaint, elected to waive the tort, and its action against defendant for the conversion of said water, by bringing and prosecuting its action in assumpsit in this court for the value of said water alleged to have been converted, which said action was brought and prosecuted prior to the bringing of this suit." Demurrers were interposed to this plea, but the record fails to show any action of the court taken on said demurrers. The defendant filed the following additional special pleas: "(4) Defendant says that plaintiff, before the bringing of this suit, and on, to wit, November 4, 1903, filed its suit in indebitatus assumpsit against defendant in the city court of Gadsden, a court of full and complete jurisdiction of the parties and subject matter of said suit, in which it treated the defendant as a purchaser of said water alleged to have been converted by the defendant, and for the conversion of which it seeks to recover in this case, and in which said first mentioned suit it sought to recover of defendant the amount due from it to plaintiff for said water, and that at the time plaintiff filed said first-mentioned suit it had full knowledge of all material facts and of the facts that defendant had taken and converted to its own use said water as alleged in said complaint in this suit. Wherefore defendant says plaintiff cannot maintain this

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action. (5) Defendant adopts plea 4 down to, but not including, the words 'Wherefore defendant says,' etc., and adds thereto the following additional averment: "That plaintiff prosecuted said suit first brought to the settlement of the pleading therein, and the trial of the cause and development of the testimony, after which and before the court pronounced judgment in the cause, plaintiff took a nonsuit in said cause. Wherefore defendant says plaintiff cannot maintain this action.' "

The plaintiff interposed the following demurrers to pleas 4 and 5: "Because it does not appear how and in what manner the plaintiff is precluded in this action by having previously filed an action in assumpsit against the defendant. Because it does not appear from said pleas of defendant that the subject-matter of said suit is the same as of this action, or that the parties are the same. Because it does not appear that the action of assumpsit complained of and which was previously brought was prosecuted to judgment. Because from all that appears from said plea of defendant, the plaintiff took a nonsuit in said action of assumpsit. Because it does not appear from said plea of the defendant that said action of the plaintiff, brought in assumpsit, was ever prosecuted to final judgment. Because, if all alleged in said plea of defendant should be proven true, then this would be no bar to this action." And to plea 5 this additional ground: "Because it appears from said plea that plaintiff took a nonsuit in said action before final judgment." Demurrers were sustained to pleas 4 and 5.

The evidence tended to show a taking by the defendant of water from the tanks of the Alabama Great Southern Railroad Company which had been placed there by the plaintiff. It further tended to show a contract between the plaintiff and the Alabama Great Southern Railroad Company, whereby the plaintiff was to furnish at a stipulated price water to the tanks of the Alabama Great Southern Railroad Company for the exclusive use of said railroad company. It was admitted that defendant had not paid plaintiff for any of the water taken. It was of-

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ferred to be shown by the defendant that defendant had paid the Alabama Great Southern Railroad Company for all the water taken from its tanks, but objection was sustained to this testimony. The summonses and complaint, together with the judgment entries and other record evidence, of the suit in assumpsit, by the plaintiff against this defendant for the price of water taken by defendant in the city court of Gadsden, was offered in evidence by the defendant, and excluded by the court on motion of plaintiff. There was judgment for plaintiff in the sum of \$268.63.

BURNETT, HOOD & MURPHREE, for appellant.—To maintain trover the plaintiff must prove property in himself and a right to the possession at the time of the conversion.—*Corbett v. Reynolds*, 68 Ala. 378; *Elmore v. Seimon & Bro.*, 67 Ala. 526.

An election once made is final. Plaintiff with the knowledge of the facts cannot waive the tort and sue in assumpsit and afterwards discontinue and sue in tort.—*Fireman Ins. Co. v. Crocheron*, 27 Ala. 228; *Singer Mfg. Co. v. Grenleaf*, 100 Ala. 273; *Miller v. King*, 67 Ala. 575; *Lehman v. Van Winkle*, 92 Ala. 443; *Fuller v. Erans*, 108 Ala. 464; 26 A. & E. Ency. of Law, 799.

On election of remedies we cite the following cases: *Hickman v. Richburg*, 122 Ala. 638; *Eufaula Grocery Co. v. Mo. Nat. Bank*, 118 Ala. 408; *Fowler v. Bowery, Sav. Bank*, 4 L. R. A. 145; 7 Ency. P. & P. pp. 361, 362, 364, 367-8-9-70-71. Having treated the original taking as rightful the city is estopped from now treating it as tortious.—*Mosely v. Williamson*, 24 Ala. 411; 11 A. & E. Ency. of Law, 428; Bigelow on Estoppel, pp. 673 and 717. To maintain trover the property must be such as its identity can be established.—*Street v. Nelson*, 80 Ala. 230; *Browning v. Hammerton*, 42 Ala. 484.

BOYKIN & BRINDLEY, for appellee.—Trover was proper action.—21 Ency. P. & P. p. 1012; *Hall v. Amos*, 17 Am. Dec. p. 42. Conversion of the water was shown in this case.—21 Ency. P. & P. p. 1014; *Connor v. Allen*, 33 Ala. 515; *Hudman v. DuBose*, 85 Ala. 446, and cases therein cited. The water was the subject of conversion.—21

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Ency. P. & P. p. 1017-18-19. The plaintiff by his suit in assumpsit was not estopped to bring trover as a voluntary non-suit was taken in the assumpsit suit.—§§ 614 and 3313, code 1896; 45 Ala. 370; 18 N. Y. 552; 49 N. Y. 164; 92 Ala. 443; 84 Ala. 216; 99 Ala. 628; 98 Ala. 644. There was no plea of estoppel and no special plea of any sort. A special plea was necessary to raise the issue.—Code of Ala. 1896, § 3295; *Phillips v. Kelly*, 29 Ala. 628; *Stein v. Ashby*, 30 Ala. 363; *Kennedy v. Lambert*, 37 Ala. 57; *Howland v. Wallace*, 81 Ala. 238; *A. G. L. Ins. Co. v. Ins. Co.*, 81 Ala. 329; *Lunsford v. Walker*, 93 Ala. 36; *L. & N. v. Trammell*, 93 Ala. 350; *K. C. & B. v. Crook*, 95 Ala. 412; *Fields v. Brice*, 108 Ala. 632; *Scarborough v. Blackmon*, 108 Ala. 656; *A. O. E. Co. v. Ryan*, 112 Ala. 337.

ANDERSON, J.—While it is true that, to support an action of trover, the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion, we think the complaint avers such an ownership and possession as will support the action. The third count claims that the water put by the plaintiff into the tank of the Alabama Great Southern Railroad Company was for a limited and specific purpose, and that it was converted by the defendant, and thus diverted from the use or purpose for which it was there put. It shows an ownership in the plaintiff and possession until used or converted by the Alabama Great Southern Railroad Company. The third count was in trover, and states a good cause of action, and was not subject to any of the grounds of the demurrer. "In its technical and more restricted sense, election of remedies is the adoption of one of two or more existing remedies, with the effect of precluding a resort to the others. The remedies here intended are known as exclusive or alternative remedies."—7 Am. & Eng. Ency. Pl. & Pr. 361. To make a case for the application of the elective principle, the party must have actually at command two inconsistent remedies.—*Morris v. Resford*, 18 N. Y. 552; *McNutt v. Hilkins*, 80 Hun (N. Y.) 235, 29 N. Y. Supp. 1047; *Kinney v. Kieran*, 49 N. Y. 164. There are cases wherein the owner may waive an action for the conversion of his property

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and bring assumpsit, and by so doing he might be precluded from subsequently maintaining trover. In order, however, for it to have that effect, both remedies must have been open to him when he made the election. In our state the owner of personal property is put to his action for a conversion and cannot recover in assumpsit for money had and received, unless there has been a sale and the reception of money, or of things as money, as the price or value of plaintiff's property.—*Smith v. Jer-nigan*, 83 Ala. 256, 3 South. 515; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Crow v. Boyd's Adm'rs*, 17 Ala. 51; *Pike v. Bright*, 29 Ala. 332. These views are not in conflict with the rule laid down in the case of *Hickman v. Richburg*, 122 Ala. 638, 26 South. 136, and cases there cited. There the plaintiff had the right to affirm the sale and recover the price, or to disaffirm the sale and recover the property; but in the case at bar the plaintiff could not maintain assumpsit, and could not be precluded from an action for conversion, upon the doctrine of election, by bringing an action that could not be maintained.

The third count does not aver that the defendant had sold the water, nor is this fact set up in the pleas; and without such an averment the pleas set up no bar to the action and the demurrers to pleas 4 and 5 were properly sustained. A demurrer was interposed to the third plea, and which said plea is subject to what has been said of pleas 4 and 5; but the record shows no ruling of the court on the demurrer to said third plea, which we must assume was abandoned by the plaintiff. So long as the third plea was in, the defendant had the right to introduce evidence in support of same, and the trial court erred in sustaining an objection to the summons and complaint in the former suit, and for this error the judgment must be reversed.

There was no error in sustaining objections to the witness Frost as to what was done on the former trial. The contract made with the Alabama Great Southern Railroad Company provided for water for its own use only, and did not license other roads to use water thereunder, nor authorize said Alabama Great Southern Railroad Company to let water to the defendant, and thus preclude the plaintiff from recovering for same.

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That the defendant paid the Alabama Great Southern Railroad Company for this water is a question between the two roads, but that fact does not deprive the plaintiff from recovering for a conversion by the defendant of its property.

The judgment of the city court must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

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Trover.

(Decided July 6th, 1906. 41 So. Rep. 954.)

1. *Appeal; Harmless Error; Ruling on Demurrer.*—Where defendants were allowed to make proof of the facts alleged in a rejoinder, it was harmless error to sustain a demurrer thereto.
2. *Trover and Conversion; Pleading; Issues.*—With the exception of a release, the plea of not guilty in trover puts in issue every matter pleadable in bar.
3. *Sheriffs and Constables; Attachment Levy; Trespass Ab Initio.*—The fact that the sheriff, subsequent to the time he attached the goods, sold them at a place other than that advertised, did not render him a trespasser ab initio and thus liable to the mortgagee, if the mortgage was fraudulent as to creditors.
4. *Same; Levy of Attachment; Return of Writ; Sufficiency.*—It appeared in evidence that during the term to which the attachment was returnable, the sheriff applied to the court for an order to sell the property levied on, on grounds stated therein, and that the application to sell was offered in evidence, reciting the fact that the attachment had been levied and return made thereon; and it further appeared that the court granted said application, that the sale was advertised and made under the order; The sheriff testified that after the sale under the order, he returned the writ into court with the money; it is apparent that the evidence referred not to the official return but the paper itself and it sufficiently appears that the sheriff made return of the writs to the term to which they were returnable.
5. *Evidence; Admissibility; Documentary Evidence; Preliminary Authentication.*—It being shown without objection that certain

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writs of attachment were issued and that the sheriff seized certain goods under them, this was sufficient preliminary proof of the authenticity of the writs to warrant their admission in evidence.

6. *Same; Judicial Knowledge; Official Signatures.*—The courts judicially know whether the officer by whom a writ of attachment purports to have been issued was a commissioned officer, and they know the genuineness of his signature; and this notwithstanding that a successor to such officer who issued the writ has been elected and is performing the duties of the office since the issuance of the writ and before it was offered in evidence.
7. *Trover and Conversion; Measure of Damages.*—The measure of damages in trover is the value of the property at the time of the conversion, with interest, but if the evidence showed a fluctuation in value between the time of conversion and the time of trial, the jury may adopt the highest value shown or any intermediate value at any time between the conversion and the trial.
8. *Same; Mortgaged Property.*—Where the plaintiff's title is based on a mortgage, the measure of damages, in trover, is the amount of the mortgage debt and interest, not to exceed the value of the property.
9. *Judgments; Parties Concluded; Parties to the Action.*—Evidence of proceedings in another cause to which one of the defendants in the pending action was not a party, are not admissible in evidence in behalf of all the defendants to the pending action, for the purpose of showing that a certain issue was res adjudicata. Such proceedings would be proper if limited in their effect to the defendants in the proceedings.

APPEAL from Morgan Circuit Court.

Heard before HON. O. KYLE.

This is an action by Martha L. Young against Ryan and others for the conversion of a stock of goods, the facts of which sufficiently appear in the opinion of the court.

D. W. SPEAKE and W. L. MARTIN, for appellant.—Where a mortgagor retains possession of a stock of goods and is permitted to sell in the regular course of trade the mortgage is fraudulent.—*Roden v. Norton*, 128 Ala. 129; *Birmingham Co. v. Roden*, 110 Ala. 511; *Owens v. Hobbie*, 82 Ala. 466; *Benedict v. Renfro*, 75 Ala. 121; *Murray v. McNecley*, 86 Ala. 234; *McDermott v. Eborn*, 90 Ala. 258; *O'Neill v. Brewing Co.*, 101 Ala. 383.

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The action will not lie against defendant at the suit of plaintiff as the evidence showed that they had paid off and discharged the decree or judgment against them growing out of the trespass complained of in this action.—*Segars v. Kirkland*, 23 Ala. 680; *Brock v. Berry*, 31 So. Rep. 517. The evidence does not connect Brock either as aider or abettor to the sheriff in the wrong complained of.—71 Ala. 406; 66 Ala. 406. Appellants had the right to justify under the writ of attachment in this case.

WERT & WERT and E. W. GODBY, for appellees.—The authorities are unbroken that to maintain the defense of seizure under mesne process, the officer invoking it must have duly returned the process within the time prescribed by law or must show a sufficient excuse for not doing so.—*Womack v. Byrd*, 63 Ala. 505. The court properly excluded the attachment writs. When sued in trespass for taking goods by the holder of the legal title the attachment plaintiff and sheriff must show the existence of a state of facts justifying the seizure under this process to enforce a special statutory remedy.—*Hundley v. Chadwick*, 109 Ala. 575; *Glass v. Tisdale*, 106 Ala. 581; *Mechlin v. Deming*, 111 Ala. 159; *Robinson v. Holt*, 85 Ala. 597. The existence of a lien is no defense either to the principal or to the sheriff.—*Hundley v. Chadwick*, *supra*; *Dean v. Eleyton Land Co.*, 21 So. Rep. 214. In reference to the effect of the decree in the case of *Berry, et al. v. Cross, et al.*, we cite the following: *Buffington v. Cook*, 35 Ala. 312; *Graham v. R. R. Co.*, 3 Wall. 704; 1 Hermann on Estoppel, 138; *McCrary v. Parks*, 18 Ohio St. 1; *Duncan v. Holcomb*, 26 Ind. 378.

DENSON, J.—Action of trover by Martha L. Young, plaintiff, against Silas P. Ryan, John L. Brock, and J. F. Lovin, defendants, for an alleged conversion of a stock of goods (drugs). The suit was commenced on the 2d day of July, 1898. The plaintiff claimed title to the goods by virtue of a mortgage which was executed to her by Thomas M. Cross on the 31st day of January, 1895. The mortgage indebtedness was evidenced by six notes given by the mortgagor to the mortgagee on the

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22d day of January, 1895, each in the sum of \$100, and due one year after date.

The complaint as originally filed alleged that the conversion occurred on the 28th day of March, 1898, but after the court overruled a demurrer filed by plaintiff to defendants' special plea numbered 2 which set up justification under an attachment issued at the suit of defendant John L. Brock against Thomas M. Cross on March 28, 1898, the plaintiff, by leave of the court, amended the complaint by striking out the date of the conversion as alleged and by inserting in lieu thereof as the date of the conversion, May 25, 1898. There were some special pleadings in the case, and the record is somewhat confusing as to the course of the proceedings with reference to part of it. By special plea 2, defendants set up justification under legal process, namely, the attachment issued at the suit of the defendant Brock against Thomas M. Cross. Plaintiff's demurrer to plea 2 was overruled, and she filed a general and two special replications, 1, 2, and 3. The defendants demurred to the special replication, assigning several grounds of demurrer, and the demurrer was sustained. The plaintiff then amended the special replications 2 and 3 which amendment appears to have been filed on the 23d day of April, 1902; the defendants then demurred to the replications as amended which demurrer contains two grounds, and was filed April 23, 1902. The court overruled the demurrer to the replications as amended. The defendants then filed a rejoinder to replications 2 and 3 as amended. Only one rejoinder to said replications is shown by the record, and it bears date of filing April 23, 1902.

The minute entry shows that the trial was had on the 24th day of April, 1902, and recites that issue was joined between the parties on the plea of not guilty, special plea 2, and the replication as amended to said plea and on the rejoinder to said amended replication. After the evidence was closed, the plaintiff was allowed by the court to file another amendment to the replication to plea 2, and the judgment entry recites that the defendants demurred to the amendment, and that the demurrer was sustained, but the record does not show what the amendment was nor the demurrer to it; they were en-

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tirely atmospheric so far as the record shows. Neither does the record show that there was any refileing of previous demurrers made to the replications. Therefore, we cannot review the rulings on demurrers to the special replications.

The judgment entry recites that by leave of the court the defendants filed an amendment to the rejoinder to the replication as last amended, and that the amended rejoinder is designated in the minute entry as rejoinder No. 3. We find no such rejoinder in the record and cannot know what it was, nor can we review the ruling on the demurrer to it. Furthermore, if it should be contended that the rejoinder which appears in the record, is the rejoinder referred to in the minute entry as No. 3, the overruling of the demurrer to it would be error without injury, as the record affirmatively shows, that the defendants were allowed to make proof of the facts alleged in it.

With reference to the pleadings we remark that there was no necessity whatever for the special pleading which encumbers the record in this case. In trover, not guilty puts in issue every matter which might be pleaded in bar, except a release.—*Morris v. Hall*, 41 Ala. 510; *Barrett v. City of Mobile*, 129 Ala. 179, 30 South. 36. In the last case cited, the reason for the rule is explicitly stated, and we will not consume time in repeating it here. Under the rule above stated no necessity arises for consideration of the ruling of the court on the demurrers to special pleas 3, 4, and 5, if the matters alleged in those pleas were good in defense, the defendants could have availed themselves of the defense under the general issue upon which the record shows issue was joined. The record shows affirmatively that the defendants attempted to make proof of the matters alleged in said pleas.—*L. & N. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603; *N. C. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 South. 589.

The circuit court tried the case upon the theory that the sheriff, in selling the property seized at a place other than the one advertised, thereby became a trespasser ab initio, and was bereft of protection under the attachment writs. And this being true, that it was immaterial as to the attitude the plaintiff as mortgagee occupied with reference to the creditors of the defendant in at-

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tachment so far as the defendants were concerned; the mortgage being valid as between the mortgagor and mortgagee.

Applying the theory as above stated to the case it was very natural that the trial terminated as it did in a verdict for the plaintiff. It has never been doubted that if an officer has legal process to execute, and voluntarily abuses and convert it to other purposes, he is not only a trespasser in that act, but becomes one ab initio, and is thus liable for all he has done under the process. This rule of the common law applies to all subordinate executive officers, and serves to confine them within the limits of their legal duties.—Bacon's Abr. Trespass. B; *Brock v. Berry*, 132 Ala. 95, 31 South. 517, and cases there cited; *Ross v. Philbrick*, 39 Me. 29; *Allen v. Crofoot*, 5 Wend. (N. Y. 506.

It is unnecessary to discuss the abstract proposition that a sheriff who advertises property seized under process for sale at a designated place and sells it at another and different place is guilty of a misfeasance in such sort as deprives him of the protection originally afforded by the process. The case in that respect has assumed a concrete form, this court having held on the facts of the case, that the sale was made without legal advertisement and that the sheriff in making it was guilty of a misfeasance by which he was dismantled of his protection, and made a trespasser from the beginning.—*Brock v. Berry*, 132 Ala. 95, 31 South. 517.

If the sheriff was a trespasser ab initio, then it cannot be and we understand it is not disputed that the defendant in the attachment suit might have maintained trespass or trover against the sheriff.—*Wright v. Spencer*, 1 Stew. 576, 18 Am. Dec. 76. But the contention of the appellants is that a stranger to the writ, one not a party to it, cannot claim any benefit from this rule of law. In this case the plaintiff as the grantee of the defendant claimed the benefit. "The authority bestowed by the law upon the sheriff did not authorize him to interfere with any of the rights of the plaintiff in this case, or to affect any title which the latter had as against the plaintiff in the attachment suit. The plaintiff in this case could not be injured by an abuse of the authority. If she has any cause of action against the defendants, it

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was complete in the instant of the levy, and the amount of her recovery could be neither increased nor lessened by any subsequent irregularity of action on the part of the defendant. The sheriff had the right to levy the attachment, if the conveyance to the plaintiff was fraudulent. The process in his hands clothed him with the right of the plaintiff therein to assert the fraud in the conveyance. His connection with the title was thus so made as to authorize him to assail the title of the defendant's grantee. The right which the process thus gave the sheriff could not be taken away by a misfeasance, which could not in any event affect the plaintiff. We cannot perceive any reason or justice in imputing to the sheriff's misfeasance the effect of converting a lawful into an unlawful act as to one who has no interest whatever in the question whether the sheriff does or does not commit a misfeasance." The quotation has been extracted from the case of *Hartshorn v. Williams*, 31 Ala. 149, which, so far as the facts of that case are concerned, presented to the court the precise question which has been presented by the case at bar. The court there held, that notwithstanding the sheriff was guilty of conduct which rendered him a trespasser from the beginning as to the defendant in the process, yet the plaintiff, grantee of the defendant in the attachment suit could not invoke the rule of law, and that the sheriff was not deprived of the privilege of showing that the plaintiff in the trover suit against him was a grantee under a conveyance that was fraudulent as against creditors of and purchasers from the defendant in the attachment suit. It is true, the decision did not have the assent of Judge Stone. He rendered a dissenting opinion. And while we have been impressed with the cogency of his reasoning in support of the conclusion he reached, which conclusion was contrary to the contention of the appellants here, yet the case has stood as authority for nearly 50 years. We can see no great hardship that the ruling there made will work, and remembering the salutary doctrine that "it is often more important that a rule of law should be fixed, even though with less of reason in it, than subject to the uncertainty of fluctuating judicial decisions," we cannot yield to the implied solicitations to overturn the case as authority. There are other authorities in support of the

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proposition that if the original taking be not a trespass, as against the plaintiff, the subsequent conversion of the property will not make the defendant liable.—*Davis v. Young*, 20 Ala. 155; *Henderson v. Marx*, 57 Ala. 169. But it is insisted that the sheriff did not make due return of the writs of attachment under which the goods were levied upon and that therefore the defendants do not come within the principle enunciated in the case of *Hartshorn v. Williams*, *supra*. The attachments were issued on the 28th of March, 1898, returnable to the next term of the court, which under the statute regulating the terms of the circuit court for Morgan county, convened on the 18th day of April, 1898, and could continue four weeks. The levy of the writs of attachment was made on the 28th day of March, the same day of their issuance.

The record affirmatively shows that on the 9th day of May, 1898, the sheriff applied to the court for an order to sell the property levied on under the writs on the ground that the property would greatly depreciate in value. The application was offered in evidence, and recites the fact that the attachments had been levied and returns made thereof. It also affirmatively appears that the court, acting on the application of the sheriff, granted the order of sale prayed for, the order of sale being set out in the record. It further affirmatively appears that the sale was advertised and made under the said order. In the face of the proof it cannot be said that the sheriff did not make return of the writs to the term of the court to which they were returnable and in due time. It is true that Turley, the deputy sheriff, testified that, "after having sold the goods under an order of the court, I returned the writ of attachment in the case, together with the money received from the sale of goods into court." But in this testimony it is quite evident that the witness was not referring to the official return but to the paper itself—the writ. This must be true because the court could not have ordered the sale without the return of the levy by the officer showing the goods levied on, and the record shows that the order was granted on proof supporting the allegations of the application. Hence, the case is withdrawn from the influence of the case of *Womack v. Bird*, 63 Ala. 500, and the insistence of the appellee in this respect cannot avail anything.

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If the plaintiff's mortgage was void as to the plaintiff in the attachment suit and the doctrine of trespass ab initio could not be invoked against the defendants, the original taking under the attachment was not void. In this view of the case, the circuit court proceeded upon an erroneous theory in the trial of the case.

The agreements between the mortgagor and the mortgagee with reference to the mortgagor being allowed to remain in possession of the goods mortgaged and the extent of such agreements, were competent evidence on the question of fraud vel non, and the court erred in not allowing proof of them to be made. If there was such an agreement between the parties to the mortgage as the defendants offered to prove, it would render the mortgage void as to creditors, existing and subsequent;—*Brock v. Berry, supra; Christian & Craft Grocery Co. v. Mitchell & Lyons*, 121 Ala. 84, 25 South. 571. 77 Am. St. Rep. 30. In this aspect of the case it would make no difference whether the plaintiffs in attachment had any lien on the goods for rent or not.

The witness Turley, after testifying that he was deputy sheriff, testified that as such he took charge of the drug business of Thomas M. Cross in favor of John F. Brock and L. P. Treup as administrator. After the witness had testified in detail about removing the goods and the sale of them, the bill of exceptions recites, "the witness further testified that said writs of attachment together with indorsements thereon are in words and figures as follows," then follow the writs and returns of the sheriff made on them, all set out in hæc verba. After the witness had given parol evidence of the contents of the writs and returns on them, the bill of exceptions states that the defendants offered said writs of attachments and indorsements thereon in evidence. A general objection made by the plaintiff to the writs was sustained.

In the view we have taken of the case the writs were competent as evidence under the general issue, and it would seem that the Brock writ, under the issue made by plea 2, was competent. But it has been insisted by the brief and argument of counsel for the appellee, that there was no proof of the authenticity of the writs. This contention cannot prevail; first, for the reason that without

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objection the witness Turley testified that the writs were issued out of the circuit court of Morgan county and that he seized the goods under them; secondly, they purport to have been issued and signed by the clerk of the circuit court of Morgan county. We judicially know who are the commissioned officers of the state within its limits, the extent of their authority and the genuineness of their signatures. This rule is not varied by reason of the fact that between the time of the issuance of the writs and the time they were offered in evidence a successor to the officer who issued the writs had been elected and was performing the duties of the office.—*Sandlin v. Anderson*, 76 Ala. 403, and authorities cited in that case; *Whitney v. Jasper Land Co.*, 119 Ala. 497, 24 South. 259; *McCarver v. Herzberg*, 120 Ala. 523, 25 South. 3; *Barron v. Tart*, 18 Ala. 668. We remark incidentally, that while the defendants were not allowed to offer the writs in evidence, there was no ruling of the court excluding the parol evidence of their contents from the jury.

The manifest purpose of the introduction of the chancery proceedings in evidence was to show that the validity vel non of the plaintiff's mortgage was res adjudicata, and therefore, that the plaintiff was precluded from maintaining the suit. "The rule of res adjudicata, is confined to those cases where the parties to the two suits are the same, the subject-matter the same, the identical point is directly in issue, and the judgment has been rendered in the first suit on that point."—*McCall v. Jones*, 72 Ala. 368; *Gidbreath v. Jones*, 66 Ala. 129; *Fidelity & Deposit Co. v. Robertson*, 136 Ala. 379 at page 410, 34 South. 933 at page 944.

Pretermittting discussion of other ingredients, we note that an essential ingredient of res adjudicata was lacking in the proceeding offered, the defendant Lovin was not a party to the suit in chancery. The proceedings were offered in behalf of all the defendants without any offer to limit the effect of the evidence to defendants Ryan and Brock, and even if the proceeding could be held competent as to them, yet, not being competent as to Lovin, the court did not err in not allowing them in evidence.—Authorities supra; *Burgin v. Raplee*, 100 Ala. 433, 14 South. 205.

• In trover, ordinarily, the measure of damages is the

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value of the property at the time of the conversion with interest, but if the evidence shows fluctuation in value after the conversion, the jury, in their discretion, may fix the value of the higher or highest price at any time between the conversion and the time of trial.—4 Mayfield's Dig. p. 998, § 220. When the plaintiff's title is based on a mortgage the measure of damage is the amount of the mortgage debt and interest not to exceed the value of the property.—*Seibold v. Rogers*, 110 Ala. 438, 18 South. 312.

Having reached the conclusion that the case was tried on an inaccurate theory as to the main proposition involved in the case, and as the propositions involved in the charges given for the plaintiff will hardly arise on another trial, we deem it unnecessary to criticise the charges given for the plaintiff. With the evidence which was excluded and which we have here held was admissible, admitted, it is clear the charges should not be given.

Neither is it necessary to discuss the charges refused to the defendant; what has been said in this opinion will be a sufficient guide for the court in this respect on another trial.

For the error pointed out, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

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Action Against Bank for Failing to Present Check.

1. *Deposit of Check for Collection; Ownership.*—Neither deposit of a check with a bank for collection, and the entry on its books as a deposit of money in favor of the owner of the check, nor the negligence of such bank in and about the collection of the check from the drawee bank whereby there is a failure to collect it, nor all of these facts combined, makes the check the property of the collecting bank.

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2. *Same; Bank Agent of Owner of Check.*—In such case the bank in which the deposit is made becomes the agent of the owner of the check to collect it.
3. *Same; Rights of Parties.*—When a check is deposited with a bank for collection, the relation of depositor and banker is consummated when the collection is made, and if not made, the bank's right to charge off the deposit arises.
4. *Same; Liability of Collecting Bank for Negligence.*—In such case, if the bank fails to collect the check through fault of its own, it is liable to the owner for all damages sustained by him through such failure.
5. *Same; How such Liability Enforced.*—In such case the liability of the collecting bank may be enforced by an action of assumption scounding in damages, for a breach of the bank's implied undertaking to use due care and diligence to collect the check, or by an action in case for damages resulting from negligence of the duties in respect of collection imposed upon it by law upon the fact of its receiving the check for collection.
6. *Same; Measure of Damages.*—In such case the owner of the check upon its non-payment is entitled to recover only the actual damages sustained by reason of the failure of the bank to perform the duties incumbent upon it to collect the check.
7. *Same; Case at Bar.*—A count in a complaint which alleges the deposit of a cashier's check with a bank for collection, an agreement on the part of the bank to undertake such duty, the sending of the check direct to the drawee bank, the suspension of the bank without paying the check, and that the collecting bank, the defendant, had refused to pay the amount of the check, does not state a cause of action and is bad on demurrer, for that it contains no allegations that plaintiff suffered any damages from defendant's failure to collect the check.
8. *Same; When Negligence in Collecting Bank to Send Check Direct to Drawee Bank.*—Where a check drawn by a cashier in his official capacity is deposited for collection, it is *prima facie* negligence in the collecting bank to send the check to be collected directly to the drawee bank for payment.
9. *Same; Notice to Depositor of Dishonor.*—Where a check is deposited for collection and the check is dishonored, it is the duty of the collecting bank to give the depositor prompt notice of the dishonor.

Tried before the HON. CHAS. A. SENN.

APPEAL from Birmingham City Court.

This was an action by the appellee against the appellant for failure to present a check deposited for collection and for failure to give notice of its dishonor.

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The complaint consisted of eight counts, the first four being the common counts. The fifth count alleged a deposit of the amount sued for by plaintiff with the defendant, and that "plaintiff demanded of defendant the payment of said sum," which was refused. The sixth count alleged that plaintiff deposited a check with the defendant for collection; that the check had been collected, "that plaintiff had demanded of the defendant the payment of said sum of money," and that defendant refused to pay same. The seventh count alleged a deposit by plaintiff with the defendant for collection a check for \$1,100.00 "drawn by Burgess Little, the cashier of the Shelby County Bank of Montevallo, Ala., upon said Shelby County Bank;" that defendant agreed to use "good faith and due care in the selection of sub-agent or sub-agencies for the collection of said check;" that defendant sent said check for collection "direct to said Shelby County Bank" which suspended without paying same; that defendant "by the proper agency could easily have collected said check," and that defendant has refused to pay plaintiff the amount of the check, although requested to do so. Defendant demurred to this count on the following grounds: (2) for that, the count did not show a breach of defendant's agreement; (3), (4) and (5) for that, no injury to plaintiff because of defendant's breach was shown; (6) for that, it did not appear that defendant was guilty of any negligence in the performance of its agreement; (7) for that, it did not appear that the sum claimed was payable on request; (9) and (10) for that, said count was in form an action of debt whereas the allegations showed a right in assumpsit for the recovery of damages. This demurrer was overruled by the court.

The eighth count alleged a deposit of a check for collection on May 13th, 1901, in substance the same as the seventh count; that "said check was presented by defendant on May 15, 1901, but was dishonored, of which dishonor defendant failed to give plaintiff any notice until May 24, 1901, by that day mailing a letter to him giving him notice which did not reach him until May 26, 1901, at which time said bank had failed;" that after plaintiff had such notice it was too late to collect said check, and that by want of timely notice plaintiff was deprived of

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an opportunity to collect the check which he could have done if such notice had been given, and that defendant subsequently refused to pay the sum named on plaintiff's request. Defendant demurred to the eighth count on the grounds: (2) that it did not show that defendant had broken its agreement; (3), (4) and (5) that it did not appear that plaintiff was injured by defendant's breach; (6) that it did not show that defendant was guilty of any negligence in performing its contract; (7) that it did not appear that the sum claimed was payable on request; (9) and (10) that the form of action was in debt instead of assumpsit; (11) that it did not appear that defendant owed plaintiff the duty to give notice of dishonor other than was given; (12) that it did not appear that any damage resulted to plaintiff from defendant's failure. This demurrer was overruled by the court.

Under the opinion of the court it is unnecessary to note the several pleas filed by the defendant, or the other rulings of the court assigned as error.

The case was tried by the court without a jury and judgment was rendered in favor of the plaintiff for the full amount of the check with interest.

RUDOLPH & HUDDLESTON, for appellant.—A bank which negligently fails to collect a check deposited for collection is liable in assumpsit for breach of its implied undertaking not in debt for the amount of the check. This follows from the rule of law that the title to the check remains in the depositor.—*Morris v. Eufaula National Bank*, 106 Ala. 383; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Peoples Bank v. Jefferson Bank*, 106 Ala. 524; *Williams v. Jones*, 77 Ala. 294.

In an action by a depositor against a collecting bank for failure to present a check for payment or failure to give notice of dishonor the complaint is bad on demurrer unless it aver that plaintiff suffered damage from the neglect of the bank.—*Morris v. Eufaula National Bank*, 106 Ala. 383; *Bank of Mobile v. Huggins*, 3 Ala. 206.

A collecting bank is not liable on the "common counts" for failure to present a check to the drawee or for failure to give notice of dishonor to the depositor. The declaration in such cases should be on a special contract.—2

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Mayfield Dig. 245, §§ 7 and 9; *Darden v. James*, 48 Ala. 33; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Tobias v. Morris*, 126 Ala. 535.

The custom of banks to send check direct to the drawee bank for collection and return is not unreasonable, nor is it negligence in every instance to do so.—*Kershaw v. Ladd*, 44 L. R. A. 236; *Wilson v. Carlinville Natl. Bank*, 52 L. R. A. 632; *Mills v. Bank*, 11 Wheat. 431; *Western, etc. Co. v. Sadilek*, 52 L. R. A. 632; *Indig. v. Natl. City Bank*, 80 N. Y. 100; *First Natl. Bank v. City Savings Bank*, (Mich.) March 13, 1900; *Heywood v. Prickering*, L. R. A. 90, B. 428.

The deposit of the check by Hendrix created the relation of principal and agent between the depositor and depositee.—*Bank v. Miller*, 77 Ala. 168; *Waid v. Smith*, 7 Wall. 451; *Dodge Co.*, 93 U. S. 385.

The title to a check deposited for collection does not pass to the collecting agent by reason of his negligent failure to collect.—*Bank v. Huggins*, 3 Ala. 206; *Morris v. Bank*, 106 Ala. 384.

CABANISS & WEAKLEY, for appellee.—Having sent the check to the drawee, and having given Hendrix no notice, in time to protect himself, the bank lost the right to charge off the deposit, which it had entered to the credit of Hendrix, and made the paper its own.

The relation between Hendrix and the bank was not that of a mere agency, but one of depositor and depositee, with the right upon the part of the bank to erase the provisional credit, if the paper was dishonored, and if it complied with its legal duties as to presentation and notice. The title and ownership passed to the bank by the deposit and blank, unrestricted endorsement. *In re Bank of Madison*, Fed. Cases, No. 890 *Kavanaugh v. Bank*, 59 Mo. App. 540; *Am. Tr. & Sav. Bank v. Mfg. Co.*, 150 Ill. 336; *Craigie v. Hadley*, 99 N. Y. 131; *Clark v. Merchants Bank*, 2 N. Y. 380; *Metro. Bank v. Loyd*, 90 N. Y. 530; *Bank v. Miller*, (Neb.) 55 N. W. 1064; 37 Neb. 500.

It was not necessary to negative, in counts 7 and 8, that the demand could not be collected in whole, or in part, out of the assets of the drawee bank. This fact of actual payment is for a plea by the defendant. Count 7,

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as amended and count 8, both allege, in express terms, that the check was uncollectible. Whether containing that allegation or not, the burden was on defendant to mitigate the damages below the *prima facie* amount of the check.—*Borup v. Nininger*, 5 Minn. 417; *Sedgwick on Damages*, 340, et seq.; *Hoard v. Garner*, 3 Sandf. 179; *Blot v. Boicean*, 3 N. Y. 78; *Allen v. Merchants Bank*, 22 Wend. 215; *Allen v. Suydam*, 20 Wend. 321.

McCLELLAN, C. J.—Neither the deposit of a check with a bank for collection, nor the entry on its books of the amount of the check as a deposit of money in favor of the owner of the check, nor yet the negligence of such bank in and about the collection of the check from the drawee bank whereby there is a failure to collect it, nor all these facts combined makes such check the property of the collecting bank, nor the owner of the check a depositor of the money entered to his credit, in such sense as gives him a right of action for money had and received, or otherwise, for the amount of the face of the check as money due him from the bank. A bank which receives a check for collection and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it. If the collection is made, the relation of depositor and banker is consummated. If the collection is not made, the bank's right to charge off the deposit arises. If the bank fails to collect the check through fault of its own, it is liable to the holder for damages sustained by him through such failure; and this liability may be enforced by an action of *assumpsit* sounding in damages for the breach of the bank's implied undertaking to use due care and diligence to collect the check, or by an action in case for damages resulting from negligence of the duties in respect of collection imposed upon it by law upon the fact of its receiving the check for collection. But the damages recoverable are by no means necessarily the amount of the check. It by no means follows from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the paper whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even

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any part of it. To the contrary, it is frequently, if not generally, true that the owner of the paper secures some part or all of the debt for which it was given in some other way, as by subsequent voluntary payment by, or suit against the drawee bank, when it is solvent, or by dividends upon its being wound up as an insolvent concern. It will, therefore, not suffice for the owner to hail the collector bank into court and implead that "you took this check to collect it, you did not do your duty in that regard and of consequence the check was not collected, therefore, the check is yours, and the amount of it in money is mine and in your hands for me, and you must pay me that amount." It does not follow from the facts the owner thus puts forward that the bank is liable to the extent he seeks to hold it, or to any extent in fact. The mere failure of collection of the check does not demonstrate the loss to the owner of the demand for which it was given, or any part of such demand. The owner should say to the bank: "You took this check for collection. Certain duties were thereby devolved upon you in respect of efforts to collect, or in respect of notice to me of its dishonor. You failed to perform those duties. From such failure resulted the non-payment of the check. Because of its non-payment I have suffered damages in the sum of so many dollars. For *these damages* you are liable to me, and must account in this action." In other words, a complaint in the common counts; or for money deposited; or for the amount of the check, averring the bank's unwarranted failure to collect it, or negligence operating to deprive the owner of opportunity to collect it—averments which, if proved and this theory of liability were sound, would entitle the plaintiff to recover the full face value of the check though his demand may have been satisfied in whole or in part from other sources, though he had suffered no damages or only nominal damages from the defendant's derelictions—would either not, by intendment or expressly, present the facts of this case—which is true of the common counts and of special counts 5 and 6—or claim a recovery on the facts of this case upon an inadmissible theory and in an amount which those facts do not justify—which is true of counts 7 and 8. Hence it is that we deem it unnecessary to discuss rulings below bearing upon the first six counts of

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the complaint: None of them is supported by the evidence. Hence it is also that we hold that the demurrers to counts 7 and 8 should have been sustained. These counts not only *claim* a sum of money, to-wit: the amount of the check, which the plaintiff by their averments is not shown to be entitled to; but they are so wanting in averments of *damages* suffered by plaintiff as to state no cause of action. It will not do to say that they aver facts which warrant a recovery of damages and that they are not rendered bad by the form and amount of the claim they make, because if they are held good against the demurrer a recovery would follow proof of their averments though no proof of damages should be made since neither of them contain any allegations that plaintiff has suffered any damages from defendant's failure to collect the check; *non constat*, but that his demand has been otherwise paid, as above suggested, and *non constat*, but that though not paid, the demand is collectible in whole or in part out of the assets of the drawee bank.—*Bank of Mobile v. Huggins*, 3 Ala. 206; *Morris v. Eufaula National Bank*, 106 Ala. 383; *Sahlien v. Bank*, 90 Tenn. 227; *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464; *Zane on Banks & Banking*, § 184.

The different doctrine which prevails where a creditor receives the check of his debtor to pay the debt may be referable to the distinctive consideration that in such case the creditor being the payee in the check or unqualified indorser is the legal holder and owner of it for the purpose of realizing upon it and applying its proceeds to his own debt; and upon this theory the case of *Watt v. Gans & Co.*, 114 Ala. 264, is not opposed to the views above expressed.

Abstractly, and *prima facie* at least, it is negligence in a collecting bank to send the check to be collected by mail or otherwise directly to the drawee bank for payment, especially when the paper is a cashier's check, i. e., drawn officially by the cashier of the drawee bank.

Of course it is the duty of a collecting bank to give the depositor prompt notice of the dishonor of a check deposited for collection.

Reversed and remanded.

HARALSON, DOWDELL and DENSON, JJ., concur.

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Shiretzki *et al.* v. Julius Kessler & Co.

Action Upon a Promissory Note.

1. *Action upon Note; Sufficiency of Plea Setting up Fraudulent Misrepresentation and Failure of Consideration.*—In an action upon a promissory note, where the defendant, by special plea, avers that the note was given for the purchase price of certain whiskey sold by plaintiff to the defendant, who was in the retail liquor business; that said sale was made through plaintiff's agent who represented to the defendant that he knew what kind of whiskey the defendant's trade would purchase; that the whiskey he proposed to sell to him would meet the demands of the defendant's trade; that the defendant did not know the character of the whiskey proposed to be sold, but relying entirely upon the representation of plaintiff's agent, purchased the whiskey and gave the note sued on, and that said representations of plaintiff's agent were false; that the whiskey which was delivered under said purchase did not meet the wants of defendant's trade, as stated by said agent; that the defendant was unable to sell the same, and that therefore the consideration for which the note was given had failed,—such plea is insufficient as setting up fraudulent misrepresentation, or as presenting the defense of a failure of consideration.
2. *Same; Sufficiency of Replication to Plea Setting up Void Contract.*—In an action upon a promissory note, where the defendant by special plea, sets up the defense that the note sued on was an Alabama contract, and was given for the purchase of whiskey, and that the same was void, for the reason the plaintiff had not paid for and obtained a license as required by law, a replication to such plea which alleges in substance that the whiskey when sold by plaintiff's agent, was not in the State of Alabama, but was in the State of Kentucky, and was to be delivered to the defendant in that state some time in the future, is a sufficient reply to said plea, and shows that said transaction was not in violation of the statute which provides that all sales of liquor are void if the seller has not taken out a license (Code § 3524.)

APPEAL from Calhoun Circuit Court.

Tried before the HON. JOHN PELHAM.

This was an action brought by the appellee, Julius Kessler & Company, a corporation, against the appel-

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lant, M. Shiretzki, and sought to recover \$100.00 alleged to be due the plaintiff by the defendant on a promissory note. The defendant pleaded the general issue, payment, a want of consideration, and the following special pleas:

"4. For further plea, defendant says, that the said alleged note was given for the purchase price of certain whiskey, which the defendant agreed to purchase from the plaintiff upon terms, etc., as follows: That defendant is engaged in the retail liquor business, and was desirous of purchasing a supply of liquors for sale in his business. That the said plaintiff's agent represented himself as knowing what defendant's trade would purchase, and stated that the whiskey which he had would meet the wants of the defendant's trade. Defendant did not know what said whiskey was, but relying solely and entirely upon the representation of plaintiff's salesman that his whiskey would meet the requirements of defendant's trade, defendant agreed to purchase some and gave his notes therefor, one of which is the note in suit. That the said representation of plaintiff's salesman as to the suitability of said whiskey for defendant was false. Defendant has tried in all legitimate ways to dispose of the said whiskey to his trade, (a small part of the lot he agreed to purchase only has been shipped to defendant), and has failed to sell or dispose of the same. That the said whiskey does not meet the wants of defendant's trade as was stated by plaintiff's said agent, and which statement defendant relied on in making such purchase. Wherefore defendant avers that the consideration for which said note was given has failed.

"5. For further answer to the complaint defendant says, that the said alleged note was made in Alabama for the purchase price of a lot of whiskey. That the contract for the purchase of said whiskey was made in Alabama. That the said plaintiff had not taken out and paid for a license to sell whiskey in Alabama, and had no license for selling liquor in Alabama. Wherefore defendant says that the said contract for the sale of said liquor and the said note are void."

To the 4th special plea the plaintiff demurred, among others, upon the following grounds: 1. For that it does not appear but that the whiskey which is alleged in said plea to have been bought by the defendant from the plain-

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tiff was not worth the price paid for the same. 2. For that it does not appear from said plea that there was any warranty as to the quality or suitableness of the whiskey alleged to have been bought by the defendant from the plaintiff. 3. For that it appears from said plea that said representations were merely the opinion of the said alleged agent of plaintiff. The plaintiff also demurred to the 5th special plea. The demurer to the 4th special plea was sustained, and the demurrer to the 5th special plea was overruled. Thereupon the plaintiff filed the following special replication to the 5th plea: "Now comes plaintiff and replies to defendant's plea No. 5, and says, that the note sued on was for the purchase price of whiskey to be delivered by plaintiffs to defendant in the future in the State of Kentucky. That plaintiffs are wholesale liquor dealers and distillers, doing business in the state of Illinois, and that said liquor, when sold to defendant was not in the state of Alabama, but was in the state of Kentucky, and plaintiffs were not engaged as liquor dealers in the state of Alabama." To the plaintiff's special replication, the defendant demurred upon the following grounds: 1. The said replication contains no sufficient statement of facts to be an answer to the said plea. 2. The fact alleged in the plea, that the liquor was in Kentucky at the time alleged, does not relieve the plaintiff of the duty to take out a license to sell or dispose of the same in Alabama. This demurrer was overruled.

Upon the trial of the case, there were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the ruling of the trial court in sustaining the plaintiff's demurrer to the 4th plea and in overruling defendant's demurrer to plaintiff's replication to the 5th plea.

CALDWELL & JOHNSTON, for appellants.—The 4th plea showed a false representation by the plaintiff's agent, and presented a sufficient defense, both for this reason and because it showed a failure of consideration.—*McKenzie v. Weineman*, 116 Ala. 194; *Steen v. Sanders*, 116 Ala. 155; *Moore v. Barber Co.*, 118 Ala. 563; *Blackman v. Johnson*, 35 Ala. 252; *Egon v. Johnson*, 82 Ala. 237; *Rice v. Gilbrath*, 119 Ala. 424.

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The 5th plea set up a valid defense, and the replication was no answer thereto.—*Woods v. Armstrong*, 54 Ala. 150; *Pacific C. Co. v. Dankes*, 57 Ala. 115; *Pacific G. Co. v. Mull*, 66 Ala. 582; *Stallings v. Lee*, 123 Ala. 464; *Moog v. State*, 93 Ala. 503.

BLACKWELL & AGEE, for appellee.

DOWDELL, J.—The 4th plea of the defendant was subject to the demurrer interposed to it. The alleged fraudulent misrepresentations set up in the plea as having been made by plaintiff's agent, cannot be considered as anything more than the expression of the agent's opinion. It is insisted that the plea is good as setting up the defense of a failure of consideration, but we think it is faulty and defective as such. It admits that the note sued on was given for whisky sold by plaintiffs to the defendant. The consideration was the whisky sold and purchased, and it is not denied that it had value. The fact that it was not such as to meet the demands of the defendant's trade, as represented by the plaintiff's agent it would do, would not amount to a failure of consideration. There was no error in sustaining the demurrer to this plea. The 5th plea alleged that the note sued on was an Alabama contract, and was given for the purchase price of whisky, and that the same was void for the reason that the plaintiff had not paid for and obtained a license for the sale of whisky as required by law. The plaintiffs replied to this plea, in substance, that the whisky when sold was not in the state of Alabama, but was in the state of Kentucky, and was to be delivered to the defendant in the future in that state. The defendant demurred to the replication and the demurrer was overruled.

Section 3524 of the code of 1896, provides, "All sales, or contracts or agreements to sell or exchange spirituous, vinous or malt liquors, are void, if the seller or party making the exchange has not a license authorizing him to engage in business as a retailer or wholesale dealer."

This statute has no application to a sale of, or contract to sell, spirituous liquors, under the facts set forth in plaintiff's replication to defendant's plea. The demurrer to the replication was, therefore, properly overruled. We

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find no error in the record, and the judgment appealed from must be affirmed.

Affirmed.

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*Prosecution for Violation of City Ordinance for Carry-
ing on Business Without a License.*

1. *License Tax; Municipal Authority to Enforce.*—It is the settled law in this State that the legislature can confer upon cities and towns the power to impose a license tax upon business.
2. *Same; When not Unconstitutional.*—If the tax is not unreasonable, and does not in its operation discriminate against one and in favor of another member of the same class, it is not violative of either the State or Federal Constitution.
3. *City Ordinance; Presumption of Reasonableness.*—When the question of the reasonableness of a city ordinance is raised, and it has reference to a subject matter within the corporate jurisdiction of the city, it will be presumed to be reasonable, unless the contrary appear upon the face of the law itself, or is established by proper evidence.
4. *Taxation; Uniformity of; When Rule not Violated.*—A city ordinance, imposing upon persons engaged in the business of furnishing trading stamps to merchants to be distributed among their customers for use in the purchase of other merchandise, a larger tax than that imposed upon merchants carrying on an ordinary mercantile business, is not violative of the constitutional provision requiring uniformity of taxation.

APPEAL from Montgomery City Court.

Tried before the HON. W. H. THOMAS.

The appellant in this case, J. E. Gamble, was tried and convicted before the recorder of the city of Montgomery for a violation of the city ordinance for carrying on without a license, the business of furnishing trading stamps to merchants to be distributed by them to their customers for use in purchasing other merchandise. An appeal was taken by the defendant to the city court of Montgomery, wherein upon proper proceedings had the

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defendant was again convicted, and, from such judgment of conviction, takes the present appeal to the supreme court.

The complaint filed by the city of Montgomery, using the language of the ordinance imposing a license for conducting the business of furnishing trading stamps to merchants, charged the defendant with carrying on such business without a license. The amount of the license imposed upon the business conducted by appellant, by the ordinance of the city of Montgomery, is \$400.00, while the license imposed upon persons conducting an ordinary mercantile business is graduated upon the maximum amount of stock on hand during the previous year.

On the trial in the court below, the appellant raised the question of the validity of the ordinance imposing the license by a motion to quash the complaint and the prosecution, and by demurrers to the complaint, contending that the ordinance was void because "oppressive, discriminating, prohibiting, unreasonable;" "Not authorized by the city charter"; "Double taxation"; "Because license imposed on merchants issuing trading stamps is an arbitrary sum, while license imposed on merchants is based upon maximum stock on hand during previous year." The motion to quash and the demurrers were overruled, and the defendant interposed the plea of not guilty; and the trial resulted in a conviction.

HILL, HILL & WHITING, for appellant.

RAY RUSHTON, for appellee.

ANDERSON, J.—The sole question involved in this appeal is the validity of the ordinance under which this defendant was convicted in the court below.

Section 10 of the act of 1894, page 635, provides "That said city council shall have the power to license all business, trades, occupations and professions not prohibited by the constitution and laws of the state of Alabama."

It is settled law in this state that the legislature can confer upon cities and towns the power to impose a license tax upon businesses and professions.—*N. C. & St. L. Ry. v. Attalla*, 118 Ala. 362; *Elsberry v. State*, 52 Ala.

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8; *Ex parte City Council of Montgomery*, 64 Ala. 463; *City Council v. Shoemaker*, 51 Ala. 114; *Abel v. State*, 90 Ala. 631; *City Council of Montgomery v. Kelly*, in MS.

If the tax is not unreasonable, oppressive, or prohibitive, it will be upheld by the courts, and is not violative of the constitution, unless in its operation it discriminates against one and in favor of another member, of the same class. "We may concede that, when a tax is imposed on avocations or privileges or the franchises of corporations, it must be equal and uniform. The equality and uniformity consists in the imposition of a like tax upon all who engage in the avocation, or may exercise the privilege."—*Phoenix Carpet Co. v. State*, 118 Ala. 151.

"So long as the burden falls with equal weight upon every member of a given class, natural and artificial alike, it is difficult to formulate an argument that such levy violates any provision of our own or of the federal constitution."—*Quartlebaum v. State*, 79 Ala. 4.

In the case at bar we have no evidence that the tax imposed is unreasonable or prohibitive. So far as we know, the defendant could well afford to pay the tax and conduct a lucrative and profitable business. The bill of exceptions sets out the amount of stock carried, and total amount for sale of stamps, but does not mention how many of said stamps have been redeemed. It may be that two-thirds of them have not and never will be presented. Besides they are only redeemed after a purchaser of goods has preserved all of his checks to the amount of \$500. If purchasers do not preserve checks to the amount of \$500, the checks avail them nothing, and go towards making up the profits of the defendant. The rule applies here, that when the question as to the reasonableness of a city ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction of the city, it will be presumed to be reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence.—*Van Hook v. City of Selma*, 70 Ala. 361; *Commonwealth v. Patch*, 97 Mass. 221; *St. Louis v. Weber*, 44 Mo. 550; *Wiggins Bridge Co. v. East St. Louis*, 107 U. S. 365; also notes 5 and 6, L. R. A. 30, page 432.

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The defendant contends that the tax in question is not uniform, in that it discriminates against him, and he introduces an ordinance fixing the tax on merchants, whose capital in business is the same as his, at \$24.00, instead of 400.00. And the question that presents itself for our consideration, and which is decisive of this case, is does the defendant belong to the class of merchants included in the last mentioned ordinance? We think not. And think that the business in which the defendant was engaged is of such a character as to not prohibit the imposition of a license tax greater than the one imposed on ordinary merchants.

These views are not in conflict with the case of *Shurgart v. State*, 138 Ala. 86, which simply decided that "Issuing trading stamps" was not violative of the statute against lotteries and gift enterprises.

The judgment of the city court is affirmed.

MCCLELLAN, C. J., TYSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

The last three cases were prepared by Mr. Coleman, while reporter, but were mislaid, and are now reported as he had them prepared. (Reporter.)

MEMORANDA
OF
CASES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE ORDERED NOT TO BE
REPORTED IN FULL.

HEAL V. THE STATE.

Crime.

(Decided April 5th, 1906. 40 So. Rep. 571.)

APPEAL from Jackson Circuit Court.

Heard before HON. W. W. HARALSON.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

KANSAS CITY M. & B. R. R. CO. V. SIMMONS.

Injury to Stock.

(Decided April 10th, 1906. 40 So. Rep. 573.)

APPEAL from Lamar Circuit Court.

Heard before HON. S. H. SPROTT.

BANKHEAD & BANKHEAD, and WARD & NESMITH, for appellant.

J. C. MILNER, for appellee.

Affirmed.

Opinion by ANDERSON, J.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

YOUNG V. WOODLIFF-DUNLAP FURN. CO.

Assumpsit.

(Decided April 11th, 1906. 40 So. Rep. 656.)

APPEAL from Jefferson Circuit Court.

Heard before HON. A. A. COLEMAN.

A. O. LANE, for appellant.

DENSON & DENSON, for appellee.

Reversed and remanded.

Opinion by SIMPSON, J.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

YOUNG V. THE STATE.

Larceny.

(Decided April 12th, 1906. 40 So. Rep. 656.)

APPEAL from Anniston City Court.

Heard before HON. T. W. COLEMAN, JR.

TATE & WALKER, for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

CAPEHART V. MCGAHEY.

Assumpsit.

(Decided April 12th, 1906. 40 So. Rep. 657.)

APPEAL from Marshall Circuit Court.

Heard before HON. W. W. HARALSON.

STREET & ISBELL, for appellant.

GOODHUE & BLACKWOOD, for appellee.

Affirmed.

Opinion by ANDERSON, J.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

MAYERS V. THE STATE.

Selling Liquor Without License.

(Decided April 19th, 1906. 40 So. Rep. 658.)

APPEAL from Bibb County Court.

Heard before HON. W. L. PRATT.

W. A. COLLIER, for appellant.

MASSEY WILSON, Attorney General, for State.

Appeal dismissed.

Opinion by DENSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

KENNEDY V. THE STATE.

Murder.

(Decided April 12th, 1906. 40 So. Rep. 658.)

APPEAL from Jackson Circuit Court.

Heard before HON. JAMES A. BILBRO.

VIRGIL BOULDEN, for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.

DUNCAN LIVERY CO., *et al.* V. ALA. MILL & ELE-
VATOR CO.

Assumpsit.

(Decided April 19th, 1906. 40 So. Rep. 661.)

APPEAL from Birmingham City Court.

Heard before HON. C. W. FERGUSON.

Affirmed.

Per curiam.

DUNCAN LIVERY CO., *et al.* V. ALA. MILL & ELE-
VATOR CO.

Assumpsit.

(Decided April 19th, 1906. 40 So. Rep. 661.)

APPEAL from Birmingham City Court.

Heard before HON. C. W. FERGUSON.

Affirmed.

Per curiam.

MILLENDER V. THE STATE.

Assault With Intent to Murder.

(Decided April 19th, 1906. 40 So. Rep. 664.)

APPEAL from Monroe Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

J. N. MILLER and MCCORVEY & HARE, for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by DENSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

SHACKLEFORD V. THE STATE.

Assault With Intent to Murder.

(Decided April 20th, 1906. 40 So. Rep. 665.)

APPEAL from Bibb Circuit Court.

Heard before HON. B. M. MILLER.

LOGAN & VANDERGRAAF, for appellant.
MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by DENSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

COLEMAN & DAVIS V. ELLIOTT.

Bill to Restrain Trespass.

(Decided April 20th, 1906. 40 So. Rep. 686.)

APPEAL from Geneva Chancery Court.

Heard before HON. W. L. PARKS.

C. E. CARMICHAEL, for appellant.

W. O. MULKEY, for appellee.

Affirmed.

Opinion by HARALSON, J.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., con-
cur.

WATSON V. SCARBOROUGH.

Unlawful Detainer.

(Decided Jan. 30th, 1906. 40 So. Rep. 678.)

APPEAL from Anniston City Court.

Heard before HON. T. W. COLEMAN, JR.

J. J. WILLETT, for appellant.

KNOX, ACKER & BLACKBURN, for appellee.

Affirmed.

Opinion by SIMPSON, J.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., con-
cur.

PETERMAN V. HENDERSON.

Trover.

(Decided April 28th, 1906. 40 So. Rep. 756.)

APPEAL from Houston Circuit Court.

Heard before HON. H. A. PEARCE.

REID & HILL, for appellant.

R. H. WALKER, for appellee.

Affirmed.

Opinion by DENSON, J.

HARALSON, DOWDELL and ANDERSON, JJ., concur.

HUDSON, et al. V. VAUGHN, et al.*Ejectment.*

(Decided April 28th, 1906. 40 So. Rep. 757.)

APPEAL from Marengo Circuit Court.

Heard before HON. A. H. ALSTON.

WILLIAM CUNNINGHAM, for appellant.

No counsel marked for appellee.

Affirmed.

Opinion by DOWDELL, J.

HARALSON, ANDERSON and DENSON, JJ., concur.

PRICE V. WORKMAN PUBLISHING CO.*New Trial.*

(Decided April 30th, 1906. 40 So. Rep. 824.)

APPEAL from Bessemer City Court.

Heard before HON. AUGUSTUS BENNERS, Special Judge

PINKNEY SCOTT, for appellant..

ESTES & SMITH, for appellee.

Appeal dismissed.

Opinion by WEAKLEY, C. J.

HARALSON, DOWDELL and DENSON, JJ., concur.

ODOM V. THE STATE.*Crime.*

(Decided April 19th, 1906. 40 So. Rep. 824.)

APPEAL from Clarke Circuit Court.

Heard before HON. JOHN C. ANDERSON.

No counsel for appellant.

MASSEY WILSON, Attorney General, for State.

Reversed and remanded.

HARALSON, DOWDELL and DENSON, JJ., concur.

SHIFF & SONS V. ANDRESS.*Bill to Remove Cloud From Title.*

(Decided April 12th, 1906. 40 So. Rep. 825.)

APPEAL from Monroe Chancery Court.

Heard before HON. THOMAS H. SMITH.

J. H. BAREFIELD, for appellant.

WIGGINS, HYBART & BAYLES, and STEINER CRUM & WEIL, for appellee.

Affirmed.

Opinion by WEAKLEY, C. J.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

RAINES V. THE STATE.

Manslaughter.

(Decided April 28th, 1906. 40 So. Rep. 937.)

APPEAL from Monroe Circuit Court.

Heard before HON. JOHN T. LACKLAND.

J. N. MILLER, for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by DENSON, J.

HARALSON, TYSON and DOWDELL, JJ., concur.

WILLIAMS, *et al.* V. NEILL, *et al.*

Bill to Abate Purchase Price.

(Decided April 19th, 1906. 40 So. Rep. 943.)

APPEAL from Pike Chancery Court.

Heard before HON. W. L. PARKS.

BRANNEN & GARDNER, for appellant.

FOSTER, SAMFORD & CARROLL, for appellee.

Affirmed.

Opinion by DOWDELL, J.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

GRANGER, *et al.* V. SIMMONDS HDW. CO., *et al.*

Bill for Relief.

(Decided April 20th, 1906. 40 So. Rep. 951.)

APPEAL from Henry Chancery Court.

Heard before HON. W. L. PARKS.

ESPY & FARMER, for appellants.

R. H. WALKER and R. D. CRAWFORD, for appellee.

Affirmed.

Opinion by DOWDELL, J.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

ROSE, et al. V. THE STATE, ex rel. SIMS.*Mandamus.*

(Decided April 17th, 1906. 40 So. Rep. 951.)

APPEAL from Butler Circuit Court.

Heard before HON. J. C. RICHARDSON.

POWELL & HAMILTON, for appellants.

STALLWORTH & BURNETT, and PEARSON & RICHARDSON, for appellees.

Affirmed.

Opinion by DOWDELL, J.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

SMITH V. THE STATE.*Murder.*

(Decided April 19th, 1906. 40 So. Rep. 959.)

APPEAL from Bibb Circuit Court.

Heard before HON. B. M. MILLER.

LOGAN & VANDERGRAAF, for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by HARALSON, J.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

MCPHERSON V. WIGGINS.*Assumpsit.*

(Decided April 23rd, 1906. 40 So. Rep. 961.)

APPEAL from Monroe Circuit Court.

Heard before HON. JOHN T. LACKLAND.

RABB & PAGE, for appellant.

T. S. WIGGINS, and STEINER, CRUM & WEIL, for appellee.

Appeal dismissed.

Opinion by ANDERSON, J.

HARALSON, DOWDELL and DENSON, JJ., concur.

DOTHAN NATIONAL BANK V. WIGGINS.*Assumpsit.*

(Decided April 28, 1906. 40 So. Rep. 967.)

APPEAL from Houston Circuit Court.

Heard before HON. A. H. ALSTON.

R. D. CRAWFORD, for appellant.

ESPY & FARMER, for appellee.

Affirmed.

Opinion by Denson, J.

HARALSON, DOWDELL and ANDERSON, JJ., concur.

A. & B. AIR LINE RY. CO. V. ALA. CONST. CO.

Assumpsit.

(Decided April 5th, 1906. 40 So. Rep. 1037.)

APPEAL from Anniston City Court.

Heard before HON. T. W. COLEMAN, JR.

JOHN P. TILLMAN, W. C. TUNSTALL, JR., and KNOX,
ACKER & BLACKMON, for appellant.

J. J. WILLETT and BLACKWELL & AGEE, for appellee.

Appeal withdrawn.

BLACK WARRIOR LUMBER CO. V. SLEDGE, *et al.*

Assumpsit.

(Decided April 17th, 1906. 40 So. Rep. 1037.)

APPEAL from Marengo Circuit Court.

Heard before HON. A. H. ALSTON.

ABRAHAM & SIMON, for appellant.

ELMORE & HARRISON, for appellee.

Appeal dismissed by agreement of counsel.

CENTRAL OF GA. RY. CO. V. HAARDT.

Damage for Loss of Goods.

(Decided April 4th, 1906. 40 So. Rep. 1037.)

APPEAL from Montgomery Circuit Court.

Heard before HON. T. SCOTT SAYRE.

CHAS. P. JONES and W. S. THETFORD, for appellant.

HILL, HILL & WHITING, for appellee.

WEAKLEY, C. J.—Appeal dismissed on authority of
State, ex rel Sayre, 39 So. Rep. 240, and *Kidd v. Burke*,
38 So. Rep. 241.

All the Justices concur.

CLOUD V. MERRIMAC MFG. CO.

Assumpsit.

(Decided Jan. 30th, 1906. 40 So. Rep. 1037.)

APPEAL from Madison Circuit Court.

Heard before HON. D. W. SPEAKE.
No counsel marked for either party.
Per curiam.—Appeal dismissed for want of prosecution.

DIXON V. THE STATE.

Murder.

(Decided April 19th, 1906. 40 So. Rep. 1037.)

APPEAL from Marengo Circuit Court.
Heard before HON. JOHN T. LACKLAND.
No counsel for appellant.
MASSEY WILSON, Attorney General, for State.
Affirmed.
Opinion by DOWDELL, J.
WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

FLEMING V. LEVERETT.

Ejectment.

(Decided Jan. 19th, 1906. 40 So. Rep. 1037.)

APPEAL from Pike Circuit Court.
Heard before HON. H. A. PEARCE.
FOSTER, SAMFORD & CARROLL, for appellant.
BRANNEN & GARNDER, for appellee.
Affirmed.
Opinion by TYSON, J.
All justices concur.

HARDEMAN V. GWIN.

Assumpsit.

(Decided Jan. 30th, 1906. 40 So. Rep. 1037.)

APPEAL from Bessemer City Court.
Heard before HON. B. C. JONES.
J. W. CHAMBLEE, for appellant.
J. A. ESTES, for appellee.
Affirmed.
Opinion by TYSON, J.
All the justices concur.

JACKSON V. THE STATE.*Crime.*

(Decided April 10th, 1906. 40 So. Rep. 1037.)

APPEAL from Perry Circuit Court.

Heard before HON. J. C. RICHARDSON.

T. P. DAUGHDRILL, for appellant.

MASSEY WILSON, Attorney General, for State.

Per curiam.

Affirmed.

L. & N. R. R. CO. V. CRABTREE.*Damages for Death of Intestate.*

(Decided April 3rd, 1906. 40 So. Rep. 1037.)

APPEAL from Cullman Circuit Court.

Heard before HON. OCEOLA KYLE.

J. M. FALKNER, GEO. W. JONES and GEO. H. PARKER,
for appellant.

J. B. BROWN, for appellee.

Per curiam.—Appeal dismissed upon the authority of
Hammond v. L. & N. R. R. Co.

L. & N. R. R. CO. V. DEER.*Garnishment.*

(Decided April 16th, 1906. 40 So. Rep. 1037.)

APPEAL from Montgomery City Court.

Heard before HON. A. D. SAYRE.

GEO. W. JONES, for appellant.

W. F. HERBERT, for appellee.

Per curiam.—The judgment of this cause having been
reversed on an appeal to the supreme court of the United
States the judgment of the city court is reversed and an-
nulled and the cause remanded.

MOBILE LUMBER CO. V. SAVAGE & MORRIS CO.*Damages.*

(Decided Feb. 8th, 1906. 40 So. Rep. 1037.)

APPEAL from Mobile Circuit Court.

Heard before HON. WILLIAM S. ANDERSON.

GREGORY L. & H. T. SMITH, for appellant.

PILLANS, HANAW & PILLANS, for appellee.

Per curiam.

Appeal abated.

PARSONS V. ALABAMA STEEL & WIRE
COMPANY.

Bill in Chancery.

(Decided Feb. 17th, 1907. 40 So. Rep. 1038.)

APPEAL from Jefferson Chancery Court.

Heard before HON. J. C. CARMICHAEL.

R. M. LOWE and W. H. CARNEY, for appellant.

SMITH & SMITH, for appellee.

Affirmed.

Opinion by DOWDELL, J.

HARALSON, SIMPSON, ANDERSON and DENSON, JJ., con-
cur.

SHEFFIELD RY. CO. V. GIPSON.

Damages.

(Decided Feb. 1st, 1907. 40 So. Rep. 1038.)

APPEAL from Colbert Circuit Court.

Heard before Hon. E. B. ALMAN.

No counsel marked for either party.

Per curiam.

Dismissed for want of prosecution.

SMITH V. THE STATE.

Crime.

(Decided Feb. 17th, 1906. 40 So. Rep. 1038.)

APPEAL from Geneva County Court.

Heard before Hon. P. N. HICKMAN.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.

Opinion by HARALSON, J.

DOWDELL, SIMPSON, ANDERSON and DENSON, JJ., con-
cur.

Affirmed.

TALLEY V. JESSE FRENCH PIANO & ORGAN CO.

Detinue.

(Decided Jan. 18th, 1906. 40 So. Rep. 1038.)

APPEAL from Coffee Circuit Court.

Heard before HON. H. A. PEARCE.

SIMMONS & CARNLEY, for appellant.

RILEY & WILKERSON, for appellee.

Per curiam.

Affirmed for want of transcript.

WILLIAMS, et al. V. HUNT.

Bill in Chancery.

(Decided April 1st, 1906. 40 So. Rep. 1038.)

APPEAL from Marshall Chancery Court.

Heard before HON. W. H. SIMPSON.

STREET & ISBELL, for appellant.

JOHN A. LUSK, for appellee.

Affirmed.

Opinion by ANDERSON, J.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

**BUTTERICK PUBLISHING CO. V. CRANFORD
MERC. CO.**

Assumpsit.

(Decided May 8th, 1906. 41 So. Rep. 80.)

APPEAL from Walker Law and Equity Court.

Heard before HON. PEYTON NORVELL.

ACUFF & ACUFF, for appellant.

COLEMAN & BANKHEAD, for appellee.

Reversed and remanded.

Opinion by WEAKLEY, C. J.

TYSON, SIMPSON and ANDERSON, JJ., concur.

N. C. & ST. L. RY. CO. V. WALLEY.

Trespass.

(Decided April 28th, 1906. 41 So. Rep. 134.)

APPEAL from Marshall Circuit Court.

Heard before HON. W. W. HARALSON.

O. C. HUNDLEY and JOHN LUSK, for appellant.

STREET & ISBELL, for appellee.

Reversed and remanded.

Opinion by ANDERSON, J.

HARALSON, DOWDELL and DENSON, JJ., concur.

NOBLE V. ANNISTON NATIONAL BANK.

Assumpsit.

(Decided April 28th, 1906. 41 So. Rep. 136.)

APPEAL from Anniston City Court.

Heard before HON. T. W. COLEMAN, JR.

W. F. JOHNSON, for appellant.
J. J. WILLETT, for appellee.
Reversed and remanded.
Opinion by DOWDELL, J.
HARALSON, ANDERSON and DENSON, JJ., concur.

WARE V. THE STATE.

Action for License.

(Decided May 8th, 1906. 41 So. Rep. 156.)

APPEAL from Mobile Circuit Court.
Heard before HON. SAMUEL B. BROWNE.
B. B. BOONE, for appellant.
R. H. & N. R. CLARKE, for appellee.
Per curiam.—Affirmed upon the authority of *Ware, et al. v. Mobile County*, 41 So. Rep. 152.

HALL V. THE STATE.

Murder.

(Decided May 10th, 1906. 41 So. Rep. 173.)

APPEAL from Monroe Circuit Court.
Heard before Hon. JOHN T. LACKLAND.
No counsel marked for appellant. MASSEY WILSON,
Attorney General for State.
TYSON, J. Reversed and remanded on the authority
of *Fryer v. The State*, 146 Ala. 4.
WEAKLEY, C. J. and SIMPSON and ANDERSON, JJ., con-
cur.

KYLE, et al. V. ALABAMA STATE LAND CO.

Bill to Quiet Title.

(Decided May 10th, 1906. 41 So. Rep. 174.)

APPEAL from Tuscaloosa County Court.
Heard before Hon. H. B. FOSTER.
DANIEL COLLIER and M. P. ORMOND, for appellant. J.
W. A. SMITH and HENRY FITTS, for appellee.
Affirmed. Opinion by SIMPSON, J.
WEAKLEY, C. J., and TYSON and ANDERSON, JJ., con-
cur.

WALKER V. THE STATE.

Gaming.

(Decided May 11th, 1906. 41 So. Rep. 176.)

APPEAL from Macon County Court.

Heard before Hon. M. B. ABERCROMBIE.

H. B. MERRITT, for appellant. MASSEY WILSON, Attorney-General for State.

Affirmed. Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

JACKSON V. THE STATE.

Murder.

(Decided May 19th, 1906. 41 So. Rep. 178.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. D. A. GREENE.

GEORGE BONDURANT, for appellant. MASSEY WILSON, Attorney-General for State.

Affirmed. Opinion by HARALSON, J.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur.

WARE V. THE STATE.

Murder.

(Decided May 17th, 1906. 41 So. Rep. 181.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. S. L. WEAVER.

W. T. STEWART and W. K. TERRY, for appellant. MASSEY WILSON, Attorney-General, for State.

Affirmed. Opinion by HARALSON, J.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

TRIBBLE V. THE STATE.

Motion to Retax Cost.

(Decided May 19th, 1906. 41 So. Rep. 183.)

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

M. K. CLEMENTS, for appellant. MASSEY WILSON, Attorney-General, for State.

Affirmed. Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

HOOKS V. HUNTSVILLE R. L. & P. CO.

Damages.

(Decided April 28th, 1906. 41 So. Rep. 273.)

APPEAL from Madison Circuit Court.

Heard before Hon. PAUL SPEAKE.

COOPER & FOSTER, for appellant. WALKER & SPRAGINS, for appellee.

Affirmed. Opinion by HARALSON, J.

DOWDELL, ANDERSON and DENSON, JJ., concur.

ELROD V. ELROD.

Allowance of Claim Against Administrator.

(Decided May 17th, 1906. 41 So. Rep. 290.)

APPEAL from Marshall Chancery Court.

Heard before Hon. W. H. SIMPSON.

STREET & ISBELL, for appellant. JOHN A. LUSK, for appellee.

Affirmed. Opinion by SIMPSON, J.

TYSON, ANDERSON and DENSON, JJ., concur.

NORMAN V. THE STATE.

Assault With Intent.

(Decided May 17th, 1906. 41 So. Rep. 295.)

APPEAL from Chilton Circuit Court.

Heard before Hon. A. H. ALSTON.

THOS. A. CURRY, for appellant. MASSEY WILSON, Attorney-General, for State.

Affirmed. Opinion by SIMPSON, J.

WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur.

ECHOLS V. THE STATE.

Larceny.

(Decided May 17th, 1906. 41 So. Rep. 298.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. S. L. WEAVER.

No counsel for appellant. MASSEY WILSON, Attorney-General, for State.

Reversed and Remanded. Opinion by HARALSON, J.
WEAKLEY, C. J., and DOWDELL and DENSON, JJ., con-
cur.

JONES V. THE STATE.

False Pretense.

(Decided May 17th, 1906. 41 So. Rep. 299.)

APPEAL from Walker Law and Equity Court.

Heard before Hon. THOS. L. SOWELL.

RAY & LEITH, for appellant. MASSEY WILSON, Attor-
ney General, for State.

Reversed and Remanded. Opinion by HARALSON, J.
WEAKLEY, C. J., and DOWDELL and DENSON, JJ., con-
cur.

L. & N. R. R. CO. v. MUSCAT & LOTT.

Damages to Stock.

(Decided May 17th, 1906. 41 So. Rep. 302.)

APPEAL from Mobile Circuit Court.

Heard before Hon. SAM'L B. BROWNE.

GREGORY L. SMITH, for appellant. FRANCIS J. INGE,
for appellee.

Reversed and Remanded. Opinion by DENSON, J.
TYSON, SIMPSON and ANDERSON, JJ., concur.

BURNS V. GIBBS.

Assumpsit.

(Decided May 10th, 1906. 41 So. Rep. 303.)

APPEAL from Lauderdale Circuit Court.

Heard before Hon. ED. B. ALMAN.

JOHN T. ASHCRAFT, for appellant. J. L. HUGHSTON,
for appellee.

Affirmed. Opinion by SIMPSON, J.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., con-
cur.

COKER V. THE STATE.

Crime.

(Decided May 19th, 1906. 41 So. Rep. 303.)

APPEAL from Monroe Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

BARNETT & BUGG and J. N. MILLER, for appellant.

MASSEY WILSON, Attorney-General, for State.

Affirmed. Opinion by SIMPSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

S. & N. ALA. R. R. CO. V. ALA. G. S. R. R. COMPANY.

Injunction.

(Decided May 19th, 1906. 41 So. Rep. 307.)

APPEAL from Jefferson Chancery Court.

Heard before Hon. JOHN C. CARMICHAEL.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellants.

A. T. LONDON and A. G. SMITH, for appellees.

Affirmed. Opinion by DOWDELL, J.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ.,
concur.

SMITH V. BIRMINGHAM RY. L. & P. CO.

Damages.

(Decided May 19th, 1906. 41 So. Rep. 307.)

APPEAL from Birmingham City Court.

Heard before Hon. CHAS. A. SENN.

STALLINGS & NESMITH, for appellant. WALKER, TILL-
MAN, CAMPBELL & WALKER, for appellee.

Affirmed. Opinion by HARALSON, J.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ.,
concur.

FORBES & CARLOSS V. DAVIDSON.

Damages for Personal Injury.

(Decided May 19th, 1906. 41 So. Rep. 312.)

APPEAL from Pickens Circuit Court.

Heard before Hon. S. H. SPROTT.

E. D. WILLETT, for appellant. FOSTER, OLIVER, COX
& COX, for appellee.

Affirmed. Opinion by SIMPSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ.,
concur.

CAMPBELL V. SHELBY COUNTY.

Injunction.

(Decided May 9th, 1906. 41 So. Rep. 407.)

APPEAL from Shelby Chancery Court.

Heard before Hon. R. B. KELLY.

MARTIN & BOULDEN, for appellant. CECILE BROWNE,
and DRYER & WEBB, for appellee.

Appeal dismissed. Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.BROWN, *et al.*, V. THE STATE, *ex rel.* GUNN.*Mandamus.*

(Decided May 9th, 1906. 41 So. Rep. 407.)

APPEAL from Shelby Circuit Court.

Heard before Hon. JOHN PELHAM.

CECIL BROWNE and E. H. DRYER, for appellant. No
counsel marked for appellee.

Appeal dismissed. Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.CAMPBELL, *et al.* V. SHELBY COUNTY.*Injunction.*

(Decided May 9th, 1906. 41 So. Rep. 408.)

APPEAL from Shelby Circuit Court.

Heard from Hon. JOHN PELHAM.

MARTIN & BOULDEN, for appellant. CECILE BROWNE,
and DRYER & WEBB, for appellee.

Appeal dismissed. Opinion by TYSON, J.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ.,
concur.

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Appeal; Review; Failure to Demur.—The question of multifariousness of a bill cannot be considered on appeal, although argued by appellant in the absence of a demurrer to the bill raising this question.—*Ellis v. Crawson*, 294.

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Appeal; Review; Questions Not Raised in Lower Court.—Where the variance between the complaint and proof was not raised in the lower court it is not available on appeal.—*Id.* 567.

Same; Harmless Error; Verdict.—The evidence warranted a finding for a larger amount than that returned by the jury, and in that state of the record it was harmless error to refuse a new trial, because the verdict was contrary to the evidence.—*Id.* 567.

Appeal; Review; Harmless Error; Ruling on Demurrer.—Where demurrers to certain pleas were overruled, and these pleas were afterwards withdrawn, the court's action on the demurrers will not be reviewed on appeal.—*Rock Island S. & D. Works v. Moore-Handley H'd'w Co.*, 581.

Appeal; Review; Questions for Review; Bill of Exceptions.—Motion to strike pleas, and parts thereof, and the court's action thereon, must be shown by the bill of exceptions, else they cannot be considered on appeal.—*Allen v. Alston*, 609.

Appeal; Harmless Error; Rulings on Evidence.—Where there was a controversy as to the balance due on a contract of sale, and the jury found with the defendant's contention, on appeal by defendant, error in the admissibility of evidence supporting plaintiff's claim was harmless.—*Gould v. Cates Chair Co.* 629

Appeal; Harmless Error; Ruling on Demurrer.—Where defendants were allowed to make proof of the facts alleged in a rejoinder, it was harmless error to sustain a demurrer thereto.—*Ryan, et al. v. Young*, 660.

§ 2. From What Appeal Lies.

Appeal; Right of Appeal; Decision Favorable to Appellant.—A decree sustaining demurrers to a bill, will not support an appeal by respondent to review the reasons given by the chancellor, who sustained certain grounds of demurrer and overruled others, as to the grounds of demurrer overruled, for it is a decree sustaining demurrer, and therefore favorable to appellant.—*Esslinger v. Herring*, 198.

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§ 4. Discretion of Trial Court.

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§ 5. Record.

Appeal and Error; Record; Organization of Trial Court.—Where the transcript fails to show the organization of the trial court, the appeal will be dismissed as no judgment is shown that will support an appeal.—*Pensacola A. & W. Ry. Co. v. Big Sandy Iron Co.* 274.

Appeal; Transcript; Contents.—Rules of Practice of Supreme Court No. 29 and 30 require that answers to original bill, before amendment, and which was embodied in the same paper with the demurrer, and the answer to the amended bill and exhibited thereto, to be copied in the record, unless the parties, or their attorneys, agree to their omission; and a motion to expunge them both from the record, in the absence of such agreement, will be overruled.—*Hutchinson v. Palmer, et al.*, 517.

Appeal; Record; Exceptions; Review.—Motion to strike and the court's action thereon must be shown by the bill of exceptions, as must the exception thereto, and not on the record proper, before this court will review such action of the trial court.—*McCleskey & Whitman v. Howell Cotton Co.*, 573

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ATTORNEY AND CLIENT.

See Appeal and Error, §§ 2-4.

Attorney and Client; Discharge; Fees.—Subject to the attorney's lien upon the fund brought into court through his efforts, or upon a money judgment, obtained by his services, a client may dispense with the services of an attorney.—*Kelley, et al. v. Horsely*, 508.

Same; Property to which Lien Attaches.—The lien of an attorney for services rendered does not attach to lands or other things, but only to money judgments.—*Ib.* 508.

ATTORNEY AND CLIENT—*Continued.*

Attorney and Client; Money Collected; Action; Parties Plaintiff Real Party in Interest.—Where the facts stated in the complaint show an implied contract to pay over money collected by an attorney for a client, the case is brought within the influence of § 28, Code 1896, and the suit should have been brought in the name of the real party in interest.—*Allen v. Alston*, 609.

BANKS AND BANKING.

Deposit of Check for Collection; Ownership.—Neither deposit of a check with a bank for collection, and the entry on its books as a deposit of money in favor of the owner of the check, nor the negligence of such bank in and about the collection of the check from the drawee bank whereby there is a failure to collect it, nor all of these facts combined, makes the check the property of the collecting bank.—*Jefferson Co. Sav. Bank v. Hendrix*, 670.

Same; Bank Agent of Owner of Check.—In such case the bank in which the deposit is made becomes the agent of the owner of the check to collect it.—*Ib.* 670.

Same; Rights of Parties.—When a check is deposited with a bank for collection, the relation of depositor and banker is consummated when the collection is made, and if not made, the bank's right to charge off the deposit arises.—*Ib.* 670.

Same; Liability of Collecting Bank for Negligence.—In such case, if the bank fails to collect the check through fault of its own, it is liable to the owner for all damages sustained by him through such failure.—*Ib.* 670.

Same; How such Liability Enforced.—In such case the liability of the collecting bank may be enforced by an action of assumption scundung in damages, for a breach of the bank's implied undertaking to use due care and diligence to collect the check, or by an action in case for damages resulting from negligence of the duties in respect of collection imposed upon it by law upon the fact of its receiving the check for collection.—*Ib.* 670.

Same; Measure of Damages.—In such case the owner of the check upon its non-payment is entitled to recover only the actual damages sustained by reason of the failure of the bank to perform the duties incumbent upon it to collect the check.—*Ib.* 670.

Same; Case at Bar.—A count in a complaint which alleges the deposit of a cashier's check with a bank for collection, an agreement on the part of the bank to undertake such duty, the sending of the check direct to the drawee bank, the suspension of the bank without paying the check, and that the collecting bank, the defendant, had refused to pay the amount of the check, does not state a cause of action and is bad on demurrer, for that it contains no allegations that plaintiff suffered any damages from defendant's failure to collect the check.—*Ib.* 670.

Same; When Negligence in Collecting Bank to Send Check Direct to Drawee Bank.—Where a check drawn by a cashier in his official capacity is deposited for collection, it is *prima facie* negligence in the collecting bank to send the check to be collected directly to the drawee bank for payment.—*Ib.* 670.

Same; Notice to Depositor of Dishonor.—Where a check is deposited for collection and the check is dishonored, it is the duty of the collecting bank to give the depositor prompt notice of the dishonor.—*Ib.* 670.

BILLS OF EXCEPTION.

§ 1. Time of Signing.

Same; Bills of Exceptions; Time of Signing; Extension by Agreement.—Under Acts 1890-91, p. 915, and an Act amendatory thereof, (Acts 1900-01 p. 227,) a bill of exceptions may be legally signed at any time within 60 days after verdict, whether it extends into the succeeding term or not; but a bill of exceptions is not signed within the time prescribed when the 60 days elapsed before the beginning of the next term, and the agreed extension of time carried it over in to the next term before signing. The time for signing cannot be extended by agreement into the next term, and the bill to be considered on appeal, must have been signed within the 60 days allowed by law.—*Dix v. State*, 70.

Exceptions, Bills of; Signing; Time.—The judgment in this case was rendered Jan. 31st, 1906, and the bill of exceptions signed Nov. 13, under orders by the court extending the time of signing to Dec. 1st, 1905. Held, that the signing was within six months of the adjournment of the term at which the judgment was rendered and within the time fixed by the trial judge under orders extending the time, and that the bill was signed in time. *Horton v. Arondale*, 458.

BUILDING & LOAN ASSOCIATIONS.

§ 1. Maturity of Shares.

Building and Loan Associations; Maturity of Shares.—The estimate made by a building and loan association as to when the stock will mature is not a guarantee, but the expression of an opinion.—*Ebersole v. So. B. & L. Asso.*, 177.

§ 2 Membership.

Building and Loan Associations; Membership; Loans; Evidence.—Where the proof shows that a party applied for membership in a corporation and received shares and afterwards borrowed money and executed a mortgage, such party occupies a dual relation and his contention that the contract is void is not supported by the proof.—*Beckley v. U. S. S. & L. Co.*, 195.

Same; Usurious Contract; Premiums; Foreign Law.—The fact that a premium was charged for a loan made in Alabama by a Minnesota corporation, did not render the loan usurious, where the Minnesota laws, which govern the contract, expressly provide that premiums shall not make the contract usurious. *Ib.* 195.

Same; Bidding.—The fact that the money borrowed was not put up to the highest bidder did not render the mortgage invalid or usurious, it having been expressly held otherwise by the Minnesota Court.—*Ib.* 195.

BURGLARY.

Burglary; Indictment; Sufficiency.—The indictment charged that defendant, with intent to steal, broke into and entered a building, to wit, the depot of the Southern Ry. Co., etc., the said depot being the property of the Southern Ry. Co., a corporation. The demurrer raises the question of the proper averment of corporate character, in that the words "a corporation" do not follow the words "Southern Ry. Co.", where first used in the indictment. Held, the indictment sufficiently avers corporate character, the last clause therein supplying the omission in the first instance.—*Peck v. State*, 100.

Same; Ownership.—Where the ownership of the building broken and entered is laid in the person having the possession and

BURGLARY—Continued.

occupancy thereof, it is sufficient, in an indictment for burglary.—*Ib.* 100.

Burglary; Railroad Cars; Ownership.—The ownership of the car was properly laid in the Southern Ry. Co., which company at the time of the alleged burglary was using the car for the transportation of freight, although the car belonged to the Illinois Central.—*Burrow v. State*, 114.

Burglary; Plea; Corporate Capacity; Proof.—In the absence of a plea denying the existence of the corporation, it was unnecessary, under Acts 1900-1, p. 2285, to prove incorporation, on a charge of burglarizing a railroad car, the property of the Southern Ry. Co., a corporation.—*Ib.* 114.

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On reasonable Doubt, see Criminal Law.

On Self Defense, see Homicide.

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See Homicide.

See Trial.

CHARITIES.

§ 1. Construction.

Charities; Construction; Trustees.—The fact that the beneficiaries of a permanent charity created by will were left to the selection of the trustees named in the will, does not limit the charity to the lifetime of such trustees, as the exercise of the power of selection would appertain to the office of trustee whether filled by the appointment of the court or by selection of the testatrix, there being no real interregnum in the office of any trust.—*Woodroof v. Hundley*, 287.

Same; Permanency.—When real estate is devised to trustees to apply the rents, incomes and profits to such objects of charity as might be designated by another, and conditioned that if first devise should fail, the trustees should apply such proceeds to the education of young men for the ministry; and the first object failing, the last becomes a valid permanent charity.—*Ib.* 287.

§ 2. Cy Pres.

Charities; Cy Pres Doctrine.—The doctrine of cy pres, as recognized and administered by the English courts of chancery in reference to trusts, being, as it was, based upon the prerogative power of kings, is not recognized by the Alabama courts.—*Universalist Convention v. May*, 455.

CHATTELL MORTGAGES.

See Mortgages.

§ 1. Failure to Record.

Same; Failure to Record.—The failure to record a chattel mortgage, unless purposely withheld for concealment or to give the mortgagor false credit, can have no other effect than to postpone its lien to after required liens.—*Rike v. Ryan*, 497.

§ 2. Retention of Possession.

Chattel Mortgages; Retention of Possession.—The fact that the mortgagor retains possession of the mortgaged chattels, or that the mortgage contains a provision authorizing the same, is not such a reservation of a benefit as will invalidate the

CHATTEL MORTGAGES—*Continued.*

conveyance as to existing or subsequent creditors of the mortgagor.—*Ib.* 497.

§ 3. Conversion of Property Therein.

Chattel Mortgages; Conversion; Wrongful Taking; Complaint.—

A count in a complaint which alleges that defendant took possession of and converted to his own use cotton raised by a third person who had given plaintiff a mortgage on such cotton, sufficiently shows plaintiff's lien and defendant's wrongful taking of the lien property.—*Baker v. Hutchison*, 636.

Same; Interest of Plaintiff; Pleading.—Where the complaint alleges that plaintiff had a lien on the cotton converted, by virtue of a mortgage executed to him by a third person, who raised the cotton so converted; that the mortgage was recorded in a certain book, in the probate office, on a certain date, in the county where defendant took the cotton, sufficiently shows plaintiff's lien and its destruction by defendant.—*Ib.* 636.

Chattel Mortgages; Conversion; Defense of Prior Lien; Pleadings.

A plea setting up as a defense that the property converted was taken by defendant by virtue of a mortgage executed to defendant by the owner of the property, is subject to demurrer for not stating facts to show that such mortgage constituted a prior lien or superior title to the one relied on by the plaintiff.—*Ib.* 636.

Same; Release of Property; Pleadings.—A plea to an action for destroying the mortgage lien of plaintiff which avers that when the mortgage was executed to plaintiff it was agreed between plaintiff and his mortgagor that enough of the crop so mortgaged should be disposed of by the mortgagor to enable him to procure supplies to make the crop, and that any cotton defendant may have obtained from the mortgagor was to pay for supplies to make the crop, furnished mortgagor by defendant, and that such supplies were necessary to enable mortgagor to make the crop, was not sufficient, as no facts are stated showing a release by the mortgagee of the particular cotton alleged to have been converted, in accordance with the agreement.—*Ib.* 636.

Same; Interest of Plaintiff; Evidence.—The mortgage and secured notes were properly introduced as links in the chain of plaintiff's title, and as showing the amounts due on them.—*Ib.* 636.

Same; Variance Between Mortgage and Notes.—The fact that the wife's name did not appear on the notes, as was stated in the mortgage, created no such variance as would impair the mortgage as a security for the debts of the actual maker.—*Ib.* 636.

Same; Ownership of Chattels; Evidence.—The ownership of the land on which the cotton was grown by the mortgagor, when there is nothing shown to the contrary, is sufficiently proven by the mortgage, dated 1902, being given on the crop of 1903, and evidence of plaintiff that the mortgagor lived in 1903 on the land sold him by plaintiff.—*Ib.* 636.

CODE SECTIONS CITED AND CONSTRUED.

Sections.

- 28. Allen v. Alston, 609.
- 40. Levystein v. Gerson, et al., 251.
- 55. Colouitt, et al. v. Gill, et al., 554.
- 76. Prickett v. Prickett, 494.
- 617. Harton v. Town of Avondale, 458.
- 620. Harton v. Town of Avondale, 458.

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Sections.

699. Sellers v. Farmer, 446.
753. Winkleman v. White, et al., 481.
759. Winkleman v. White, et al., 481.
799. Ensley Development Co. v. Powell, 300.
809. Johnson v. Johnson, 543.
819-820. Etheridge Bros. v. Swan, et al., 531.
823. Dickinson v. Traphagan, 442.
823. Montgomery Iron Works v. Roman, 434.
914. Williams v. State, 10.
915. Williams v. State, 10.
928. Williams v. State, 10.
930. Williams v. State, 10.
947. Folmer, et al. v. Lehman-Durr Co., 472.
1041. Jacoby v. Funkhouser, 254.
1109. Anderscn v. Buckley, 415.
1291-1300. Black v. Sullivan Timber Co., 327.
1316. A. J. Cranor Co. Ltd. v. Miller, 268.
1794. Patterson v. Carter, 522.
1794. Thomas v. Tilley, et al., 189.
1795. Fuller v. State, 35.
1805. Hand Lumber Co. v. Hall, 561.
1841. Ebersole v. So. Bldg. & Loan Asso., 177.
1914. McGraugh v. Deposit Bank, 229.
2065. Phillips v. Bradford, 346.
2069. Phillips v. Bradford, 346.
2182. Montgomery Iron Works v. Roman, 434.
2348. Winkleman v. White, 481.
2529. Patterson v. Simpson, 550.
2712. Hendrick v. Clemmons, 590.
2733. Tolbert v. Falkenberry, 204.
2760. Hendrick v. Clemmons, 590.
3271. Eagle Iron Co. v. Baugh, 613.
3303. Wallace v. Markstein, 262.
3326. Williams v. The State, 10.
3328. Williams v. The State, 10.
3423. Gillespie, et al. v. Gibbs, 449.
3505. Wallace v. Markstein, 262.
3506. Fuller v. Varnum, 336.
3524. Shiretski v. Kessler & Co., 678.
4205. Eagle Iron Co. v. Baugh, 613.
4207. Eagle Iron Co. v. Baugh, 613.
4264. Allen, et al. v. Bromberg, et al., 317.
4266. Allen, et al. v. Bromberg, et al., 317.
4287. Ellis v. Crawson, 294.
4298. Ellis v. Crawson, 294.
4299. Ellis v. Crawson, 294.
4314. The State v. Sikes, 160.
4314. The State v. Fuller, 164.
4316. State v. Sikes, 160.
4333. Burrows v. The State, 114.
4333. Knight v. The State, 104.
4333. Peck v. The State, 100.
4333. Hammond v. The State, 79.
4346. Ray v. The State, 5.
4246. Dixon v. The State, 91.
4418. Burrows v. The State, 114.
4475. Ossie v. The State, 152.
4509. Ossie v. The State, 152.
4523. Ossie v. The State, 152.
4525. Ossie v. The State, 152.

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- 4526. *Ossie v. The State*, 152.
- 4711. *Fuller v. The State*, 35.
- 4762. *Wester v. The State*, 121.
- 4817. *The State v. Fuller*, 164.
- 4819. *The State v. Fuller*, 164.
- 4838. *Ossie v. The State*, 152.
- 4839. *Ossie v. The State*, 152.
- 4856. *Ray v. The State*, 5.
- 4857. *Parham v. The State*, 57.
- 4889. *Dixon v. The State*, 91.
- 4895. *Knight v. The State*, 104.
- 4901. *Lee v. The State*, 133.
- 4919. *Roland v. The State*, 149.
- 4937. *Gordon v. The State*, 42.
- 4961. *Williams v. The State*, 10.
- 4972. *Knight v. The State*, 93.
- 4982. *Hanners v. The State*, 27.
- 5004. *Hammond v. The State*, 79.
- 5007. *Hammond v. The State*, 79.
- 5262. *Hamilton v. The State*, 110.

COLLATERALS.

§ 1. Assignment of.

Pledges; Assignment of Debt; Exhausting Collateral.—Complainants assigned to one of respondents the note of B. but did not assign the collaterals held to the note, although it was expressly agreed that they would do so for the benefit of another respondent. Held, that under § 947 code of 1896, the complainants were required to exhaust the collaterals withheld before proceeding against the respondent for whose benefit it agreed to transfer the collaterals.—*Folmar, et al. v. Lehman-Durr Co.*, 472.

CONCEALED WEAPONS.

Carrying Concealed Weapon; Jury Question.—Whether the pistol was carried in such manner as not to be discernible by ordinary observation is a question for the jury.—*Hainey v. State*, 146.

Same; Evidence; Admissibility.—It was error to admit evidence that defendant was drunk at the time it was alleged he carried a concealed pistol.—*I.*, 146.

Same.—It was inadmissible to show that the accused was a brother of a person whom the officers were seeking to arrest for drunkenness at the time the accused is alleged to have carried the concealed weapon.—*Ib.* 146.

CONSTITUTION—*Sections Cited and Construed.*

1875.

Sec. 6, Art. VI, *State v. Fuller*, 164.

1901.

- 22. *Montgomery L. & W. P. Co. v. Citizens L. H. & P. Co.* 359.
- 143. *State v. Fuller*, 164.
- 148. *Ensley Development Co. v. Powell*, 300.
- 223. *Horton v. Town of Avondale*, 458.
- 232. *Dickinson v. Traphagan*, 442.

CONSTITUTIONAL LAW.

§ 1. Police Power.

Constitutional Law; Police Power; Fraud.—Section 4762 of Code of 1896 is not violative of the constitutional guaranty to every

CONSTITUTIONAL LAW—*Continued.*

person of the right to enjoy, use, and dispose of his property. It being for the prevention of fraud and a proper exercise of the police power.—*Wester v. State*, 121.

§ 2. Limitation of Powers.

Constitutional Law; Limitation of Powers.—The legislative branch of the State government has supreme power in the enactment of laws, except where this power is limited by the constitution.—*Ensley Div. Co. v. Powell*, 300.

§ 3. Due Process.

Constitutional Law; Due Process; Special Assessment.—The assessment of the cost of improvement against lands abutting in the immediate vicinity of the improvement, being a part of the taxing power of the government, cannot be said to be without due process of law, because there is not a provision for a regular investigation by court and jury in order to ascertain the amount of burden that shall be placed upon the property.—*Harton v. Avondale*, 458.

Same; Constitutional Provision; Instruction.—§ 223 constitution 1901 merely fixes the limit beyond which assessments for municipal improvement on abutting property shall be void, and authorizes the courts to examine the matter and determine whether or not such constitutional limit has been transcended; and such provision has no application to the manner in which the assessment is proportioned, whether by the front foot, or otherwise.—*Harton v. Avondale*, 458.

CONTRACTS.

See Sales.

§ 1. Cancellation.

Contracts; Cancellation; Grounds.—Neither inadequacy of consideration, mistake in law, or partial failure of consideration, in the absence of fraud, will authorize the cancellation of a contract.—*Stephenson v. Atlas Coal Co.*, 432.

CONVICTS.

§ 1. Contract of Hire.

Convicts; Contracts of Hire; Powers to Annul.—If the convicts are cruelly treated, or if the bond of the hirer is insufficient or deemed so, however the information is obtained, the Judge of Probate may, under Section 4526, Code of 1896, of his own motion, annul contracts for the hire of county convicts, whether hired inside or out of the county.—*Ossie v. State*, 152.

Same; Annulling Contract for Insufficiency of Bond.—The present state of insecurity for the future, will justify the annulment of the contract of hire on account of the insufficiency of the hirer's bond, and the annulment is not confined to the fact of a change in the sufficiency of the bond from what it was when originally made.—*Ib.* 152.

CORPORATIONS.

See Municipal Corporations.

§ 1. Foreign Corporations.

Corporations; Foreign Corporations; Non-compliance with Statute; Effect.—One who has entered into a contract of sale with a foreign corporation, and has performed the contract by a delivery of the property sold to the corporation, cannot urge, as a ground for setting aside the sale, the failure of the corporation organized in another State to comply with Section

CORPORATIONS—*Continued.*

1316, Code 1896, and the Constitutional provision relating thereto.—*A. J. Cranor Co. v. Miller, et al.*, 268.

§ 2. Contracts Before Incorporation.

Same; Contracts before Incorporation; Construction.—Appellees, owners of a saw mill outfit and timber contract, entered into an agreement with the company to sell said saw mill outfit and timber rights to the company in consideration of the organization of a corporation for the manufacture of lumber; stipulating further, also, that the corporation should be capitalized at \$10,000, one-fourth of the stock to be owned by appellees, and three-fourths to be owned by the Company. Held, the contract so entered into stipulated, not only the organization of a corporation, but that the company would contribute something of value to it in consideration of three-fourths of the stock which should be owned by the company.—*A. J. Cranor Co. v. Miller*, 268.

Same.—Where a company agreed to organize a corporation to be capitalized at \$10,000, one-fourth of which was to be owned by the owner of a saw mill outfit and timber rights and three-fourths to be held by the company, and in compliance with the contract the owner of a saw mill outfit and timber rights conveyed to the corporation his property in consideration of one-fourth of the stock, and the company did nothing towards its part of the contract in the way of payment for three-fourths of the stock held by it, and the rights of no other stock holders intervening to be affected by the cancellation of the sale, the seller was entitled to maintain a bill against the company and the corporation to have his right in the saw mill outfit and timber restored to him.—*Ib.* 268.

§ 3. Dissolution.

Corporations; Voluntary Dissolution; Directors as Trustees.—

The dissolution of a Florida corporation under a decree of the Florida court, made upon application of a majority of the stockholders, is a voluntary dissolution under § 2157, Rev. Stat. of Fla., and under such section, upon a voluntary dissolution, its then president and board of directors become the trustees of its assets and powers, with authority and power to wind up its affairs.—*Black v. Sullivan Timber Co.*, 327.

Same.—When a corporation of the State of Florida has been dissolved by the courts of that state on the application of a majority of its stockholders, and its affairs has passed into the hands of its then board of directors, a stockholder participating in the dissolution proceedings may not apply to an Alabama court for the appointment of a receiver of the corporation upon the allegation that the ultimate dividends from its assets when distributed would be lessened by the wrongful management of its trustees, although all its property may be situated in this State.—*Ib.* 327.

Same; Appointment of Receiver; Allegations and Proof.—To justify the appointment of a receiver the allegations and the proof in support of them must be clear and positive.—*Ib.* 327.

§ 4. Stockholders Liability for Debts of.

Corporations; Stockholders; Liability for Debts; Stock Issued for Insufficient Consideration.—Where members of a corporation paid for the stock issued to them by conveying land at an agreed valuation, which was considerably over-valued, a subsequent creditor, who had full knowledge of the fact, cannot compel a stockholder, on the insolvency of the corporation, to

CORPORATIONS—*Continued.*

pay the difference between the value of the land conveyed by him and the par value of the stock.—*Lea v. Iron Belt Mer. Co.*, 421.

Corporations; Stockholders; Transfer of Property.—Defendants purchased the property of another company for \$25,000, agreeing to pay, in addition, certain debts of the company amounting to about \$4,000. The consideration stated in the deed transferring the property to them, they procured to be \$50,000, and they subscribed thereafter, \$50,000 to the stock of the new company, which they paid by executing a deed to the property purchased from the other company, and were to receive, in addition to their stock, \$30,000 of an issue of bonds to the amount of \$50,000, to be secured by a deed of trust on the property of the new corporation. Of this issue they received \$25,000 of bonds. On a sale of the property under the deed of trust the bondholders realized only 20 per cent. of the amount due on their bonds. The evidence showed that \$50,000 was full value for the property conveyed to the new company. Held, that as the evidence showed a sale of the property to the new company for \$80,000, which was to be paid for by \$50,000 of the stock and \$30,000 of bonds, the reception of the bonds at a later period does not alter the fact that it was one and the same transaction, and for this reason the stockholders were not, at the suit of a creditor of the corporation, entitled to have the entire value of the property applied as a payment on the stock.—*Montgomery Iron Works v. Roman*, 434.

Same; Actions by Creditors; Limitations.—The statute of limitations does not begin to run in favor of stockholders for unpaid subscriptions to stock, at the suit of a creditor of the corporation, until judgment against the corporation and a return of an execution *nulla bona*.—*Ib.* 434.

Corporation; Stockholders; Liability; Action to Enforce; Nature and Form.—Equity cannot entertain a bill by a simple contract creditor to require a stockholder of an insolvent corporation to pay balance due on subscription to stock under § 823 of the code 1896, this right belongs only to judgment creditors.—*Dickinson v. Traphagan*, 442.

Same.—Acts 1903, p. 388, has no application to a bill filed by a contract creditors to subject a stock subscription to his claim.—*Ib.* 442.

Same; Necessity of Judgment and Execution against Corporation; Insolvency of Incorporation.—A simple contract creditor may not maintain a bill to subject a stock subscription to his claim without first obtaining a judgment and a return of execution *nulla bona*, on the mere insolvency of the corporation.—*Ib.* 442.

Same; Pleading; Bill; Sufficiency.—A bill by a contract creditor to subject a stock subscription to his claim against a foreign corporation, which alleges that there was no person in the service of the corporation within the State, was insufficient and subject to demurrer; and was not the equivalent of an allegation of non compliance with the statute in not having a known place of business and an authorized agent, so as to show that it was impracticable to obtain a judgment.—*Ib.* 442.

Same; Persons Liable; Married Women.—The general statute imposing liability on shareholders of unpaid subscriptions includes married women, and they are not exempt by reason of coverture.—*Ib.* 442.

CORPORATIONS—Continued.

§ 5. Officers and Agents.

(a) Notice to.

Same; Officers and Agents; Knowledge of Agents.—Where the agent of a corporation, being the sole manager and almost sole stockholder of the corporation, was personally interested in a transaction with the insolvent corporation, and his transactions with the insolvent corporation was for the joint benefit of himself and his corporation, his knowledge of the fact that the subscriptions to the insolvent corporation stock were paid in over-valued land, was imputable notice to his corporation.—*Lea v. Iron Belt Mer. Co.*, 421.

Same.—The rule that the knowledge of an agent prior to the creation of the agency is not notice to the principal, does not apply where the agent was the alter ego of the principal, which he represented, and had absolute dominion over its affairs and was jointly interested with the principal in the transaction.—*Ib.* 421.

§ 6. Assignment of Claim.

Corporations; Assignment of Claim; Sufficiency.—In the absence of evidence showing that the vice president of a corporation was authorized to execute the assignment of a claim, such assignment executed by the vice president, to which the corporate seal was not attached, was inadmissible in evidence in an action on the claim, especially where such assignment recites that the vice president was authorized to execute it 'in the name and under the seal.'—*Allen v. Alston*, 609.

COURTS.

§ 1. Terms.

Courts; Simultaneous Terms.—The regular circuit judge may hold special terms during the session of a regular term of court in his circuit, under Sections 928 and 930, Code 1896.—*Williams v. State*, 10.

Courts; County Court; Establishment; Validity of Statute.—The fact that the act creating the County Court of Cleburne County (Acts 1896-7, p. 802) confers on said court the same jurisdiction and powers of the circuit court, does not render the same unconstitutional.—*State v. Fuller*, 164.

§ 2. Jurisdiction.

Courts; Jurisdiction; Constitutional Provisions; Statutes.—Acts 1894-95, p. 881, the act which confers chancery powers and jurisdiction upon the circuit courts of Jefferson and other counties, is not unconstitutional.—*Ensley Dev. Co. v. Powell*, 300.

CRIMINAL LAW.

See Appropriate Title for Particular Crimes.

§ 1. Appeals; Instructions.

Criminal Law; Appeal; Instructions; Exceptions in Gross.—An exception to the whole of the court's oral charge, where the same consisted of several paragraphs, is not sustained, unless the whole charge is bad.—*Grisham v. The State*, 1.

Same; Instructions; Duty to Request.—The fact that the court had failed to charge on all the offenses embraced in the indictment, cannot be taken advantage of in the absence of requested specific instructions covering such matter.—*Ib.* 1.

Same; Charge; Construction.—Although a charge in a criminal case consists of separate paragraphs, it must be construed as a whole.—*Ib.* 1.

CRIMINAL LAW—Continued.

Criminal Law; Instructions; Failure to Charge; Appeal; Review.

—A request orally to have the court instruct the jury on the law of self defense and an exception reserved to the failure or refusal of the court to do so, presents no question for review on appeal.—*Williams v. State*, 10.

Same; Instructions; Modification.—At the defendant's request, the court in writing instructed that unless each and every member of the jury was convinced beyond all reasonable doubt of the defendant's guilt, under the evidence in the case, they should not convict him; and, that unless every juror believed beyond all reasonable doubt that defendant killed deceased by shooting him with a pistol, within the county, before the finding of the indictment, and that such killing was wilful and deliberate and premeditated and malicious, the defendant could not be found guilty of murder in the first degree. The court added that the first instruction simply meant that the jurors must all agree on the verdict, and that all twelve must agree before they could return any verdict, and that the second instruction simply meant that all the jurors must agree on the elements of murder in the first degree. Held, not error.—*Ib.* 10.

Criminal Law; Instructions; Refusal.—The court will not be put in error for refusing instructions substantially covered by instruction given.—*Ib.* 10.

Same; Charges Argumentative.—Charges which are mere arguments are always properly refused.—*Gordon v. State*, 42.

Same; Argumentative Instructions.—A charge asserting that there was no evidence in the case that defendant did or said anything at a certain house near which the killing occurred that would have justified the deceased in striking defendant, was properly refused as argumentative.—*Glass v. State*, 50.

Same; Repetition of Instructions.—Where a proposition has been clearly stated in a written charge given, it is not error to refuse charges which are substantial duplicates thereof.—*Parham v. State*, 57.

Same; Argumentative Instructions.—A charge which asserts that the law says it is better that the guilty go unpunished, than that the innocent, or those whose guilt is not shown beyond a reasonable doubt, should be punished, besides being erroneous, is argumentative.—*Ib.* 57.

Same; Incomplete and Misleading Instructions.—A charge asserting that before the jury are authorized to convict, the hypothesis should follow naturally from the evidence, and be consistent with all of it, being incomplete and misleading in that it is not stated what hypothesis is referred to, was erroneous and properly refused.—*Ib.* 57.

Same; Instructions; Exceptions.—Exception taken to an uncompleted sentence of the court's oral charge is not available on appeal.—*Cross v. State*, 125.

Criminal Law; Instruction; Repetition.—It is not error to refuse instruction covered by those given in writing at the request of defendant.—*Hainey v. State*, 146.

(b) Presumption on.

Criminal Law; Appeal; Presumptions.—The indictment was preferred at a special term of the court held on May 22nd, 1905. In another county in the same circuit, the statute required that the court begin in regular session on May 15th, 1905. There is an absence of evidence as to whether the court in the other county in the same circuit was in session or had adjourned. Under such a state of facts, it will be presumed on an appeal from a conviction had at a trial at such special term

CRIMINAL LAW—Continued.

that the regular term of the circuit court in the certain other county of the circuit was adjourned at the end of the first week of its session preceding the commencement of the special term.—*Williams v. State*, 10.

Same; *Appeal*; *Presumptions*; *Consistency of Instruction*.—Where the oral charge of the court is not set out in the transcript, it will be presumed, on appeal, that the charges given for defendant were not in conflict therewith.—*Hammond v. State*, 79.

(c) What Record Shows.

Criminal Law; *Appeal*; *Record*; *Review*.—The ruling of the circuit court sustaining demurrers to pleas which is not shown by the record proper, but only by bill of exceptions, are not reviewable on appeal.—*Williams v. State*, 10.

Criminal Law; *Appeal*; *Record*.—The record not showing the difference between the copy of the indictment served upon the defendant, and the true indictment, defendant's objection to being put upon trial on the grounds that no true copy of the indictment had been served on him, cannot be reviewed, on appeal.—*Parham v. State*, 57.

Same.—The record failing to show what answer was expected to a question to which an objection was sustained, such ruling cannot be reviewed, upon appeal.—*Ib.* 57.

Same; *Questions Reviewable*; *Bill of Exceptions*; *Necessity*.—Motion in arrest of judgment assigning grounds therefor, together with the court's action thereon, cannot be reviewed on appeal, unless shown by bill of exceptions.—*Dix v. State*, 70.

Criminal Law; *Record*; *Presence of Accused*.—Where it appears from the record that defendant was present in person and by counsel at the commencement of the trial, and it also appears that he was present at the time of pronouncing sentence, the record sufficiently shows his presence during the trial.—*Knight J. v. State*, 104.

Same; *Arraignment*.—It is a sufficient arraignment, in a prosecution for embezzlement, that the solicitor read the indictment to the jury in the presence of the defendant and he interposed thereto his plea of not guilty.—*Ib.* 104.

Criminal Law; *Plea of Not Guilty*.—A trial on its merits cannot be entered into until the defendant has pleaded not guilty, or that plea has been entered for him by the court, and this fact must affirmatively appear of record before a conviction can be had, under Section 5262, Code 1896.—*Hamilton v. State*, 110.

(d) Harmless Error.

Same; *Appeal*; *Harmless Error*; *Objection to Question*.—Where the answer to the question was contained in the subsequent testimony of the witness, it was harmless error to sustain an objection to the question when asked.—*Parham v. State*, 57.

Same; *Harmless Error*; *Form of Question*.—A witness having stated in detail what defendant said, without objection, anything objectionable in the form of a question about threats made by defendant against deceased was harmless error.—*Ib.* 57.

Criminal Law; *Appeal*; *Harmless Error*.—Possession being a collective fact to which a witness may testify, and it being shown that the building broken and entered was in the possession of the Southern Ry. Co., if it was error to permit parol evidence of the ownership of the building, it was error cured by § 4333, Code of 1896, and harmless.—*Peck v. State*, 100.

CRIMINAL LAW—*Continued.*

(e) Finding of Court.

Criminal Law; Appeal; Review; Finding by Court.—Although the act conferring on the County Court of Lawrence County, jurisdiction of misdemeanor does not authorize this court to review the conclusions of the Judge on the evidence in cases tried without a jury, where there is no conflict in the evidence, the action of the court in applying the law to the facts will be reviewed.—*Bradford v. State*, 118.

Same; Omitting Evidence; Review.—This court will not, on appeal, review the judgment of the lower court on the facts, where the bill of exceptions does not purport to set out all the evidence.—*State v. Sikes*, 160.

§ 2. Evidence Generally.

Criminal Law; Evidence; Conversations.—Where the State introduced parts of conversations, immaterial as evidence, the defendant was entitled to bring out all of the conversations, or give his version of it, and it was error to refuse to permit him to do so.—*Ray v. State*, 5.

Criminal Law; Evidence; Non Expert Testimony.—A non expert witness on pistol or gun shot wounds may testify that a wound made by a bullet was a penetrating one, if he had examined the same.—*Williams v. State*, 10.

Criminal Law; Evidence; Res Gestae.—Declarations of the accused made while at the scene of the killing in the presence of the body of deceased, with a pistol still in his hands, are admissible as part of the res gestae without regard to proof that they were voluntary.—*Ib.* 10.

Same; Expert Testimony.—An expert is entitled to express his opinion as to where the bullet which produced deceased's death entered his head.—*Ib.* 10.

Same; Res Gestae; Continuous Transactions.—Evidence of the details of what occurred at the time of the killing, constituting as it does one continuous transaction, is admissible as res gestae.—*Ib.* 10.

Criminal Law; Conversation of Conspirators; Admissibility.—Conversations had between defendant and two other persons, immediately before the killing, tending to show a conspiracy between the parties to the conversation to kill the deceased or to do him great bodily harm is admissible in evidence.—*Hanners v. State*, 27.

Criminal Law; Conduct of Accused at Time of Arrest.—Under the rule that the conduct and demeanor of a defendant at the time of his arrest are admissible against him, it is competent to show that at the time defendant was arrested he threw his hands behind him and drew a pistol.—*Glass v. State*, 50.

Same; Evidence.—It was improper to permit the state to show that a witness examined by it was summoned by the defendant, as the only purpose for so doing was to prejudice the jury against defendant.—*Ib.* 50.

Same; Evidence; Opinion.—It is objectionable as calling for an opinion, to ask whether deceased was afraid to go about alone at night.—*Parham v. State*, 57.

Same; Evidence; Hypothetical Questions.—Where the question was not confined to the pool of water testified about, and the conditions of the indefinite pool were not shown to be the same as the pool in testimony, a hypothetical question as to a pool of water becoming colored is objectionable.—*Ib.* 57.

Criminal Law; Evidence; Res Gestae.—Evidence that after shooting deceased defendant shot a brother of deceased, is admissible as part of the res gestae. So, also, evidence that some of

CRIMINAL LAW—Continued.

the shot from defendant's gun went through the clothes of a witness.—*Hammond v. State*, 79.

Same; *Evidence*; *Exclusion of Evidence*.—The party calling forth an answer responsive to his question has no right to have it excluded.—*Ib.* 79.

Same; *Opinion Evidence*; *Conclusions*.—A witness may not state that if certain named persons had exchanged pistols he would have seen it. Such a statement is a mere conclusion.—*Ib.* 79.

Criminal Law; *Evidence*; *Res Gestae*; *Other Offenses Part of Same Transaction*.—The defendant being indicted for the larceny of a locket, it was competent to show that defendant was in prosecutrix room and remained there while prosecutrix was out, and that on her return defendant was gone and prosecutrix pocket book containing the locket and some money was missing, it all being a part of the same transaction.—*Bradford v. State*, 95.

Same; *Subsequent Incriminating Circumstances*; *Intent to Escape*.—It was proper to admit in evidence that portion of defendant's letter to his mother in which he said, in effect, that they intended to send him to the penitentiary, but it would not be done, as he intended to break jail, as affording an inference that it was inspired by consciousness of guilt.—*Ib.* 95.

Criminal Law; *Evidence*; *Trailing with Dogs*.—Evidence as to the trailing of defendant by dogs was admissible where it was shown that the person in charge of the dogs was engaged in the business of trailing persons with dogs; that the dogs used to trail defendant were trained to trail human beings; that one of them had had four years training; that the other had had experience also, and that the dogs had trailed sixty or seventy persons in the last four years.—*Hargrove v. State*, 97.

Same; *Tracks*.—It being admitted that a certain pair of shoes belonged to the defendant, and that he wore them on the day of the night of the burglary, it was permissible to show that the shoes were obtained from defendant's house after his arrest, and that they were of the same length and width as the tracks found near the place where the burglary was committed.—*Ib.* 97.

(b) Confession.

Same; *Evidence*; *Confessions*; *Admissibility*.—The defendant, while in the custody of the arresting officer, was taken into a closed room by such officer and the justice issuing the warrant, just before entering into his preliminary examination, and asked by the justice a question which assumed defendant's guilt. The evidence further tended to show that defendant was a weak minded person, and began to cry when the question assuming his guilt was put to him. Held, that an alleged confession evoked in this manner was inadmissible, even though it was shown that no threats were made or promises given to induce same.—*Peck v. State*, 100.

Criminal Law; *Evidence*; *Confessions*; *Admissibility*.—Although the accused was in the custody of the sheriff, confessions made while so in custody were admissible where it is shown that no threat was made or any reward or inducement offered to obtain them.—*Hamilton v. State*, 110.

§ 3. Venue; Charge.

Criminal Law; *Change of Venue*; *Order of Judge*.—The *ex parte* order of the Judge issued to a sheriff of another county ordering him to retain possession and custody of the defendant was not a judicial ascertainment that there was danger of violence

CRIMINAL LAW—Continued.

to the defendant if placed in the jail of the county where the crime was committed, on the issue of facts presented by a petition for a change of venue, because of prejudice on the part of the inhabitants of the county where the crime was committed.—*Williams v. State*, 10.

§ 4. Instructions Generally.

Criminal Law; Argumentative Instructions.—An instruction asserting that the jury should view the testimony of a witness in the light of the fact that the defendant had shot at witness at the time of the killing, was argumentative and properly refused.—*Williams v. State*, 10.

Criminal Law; Instructions; Abstract Charges.—As evidence of whether a witness was or was not guilty of the commission of a felony, of which he admitted he had been convicted, would not have been competent, if offered, to bolster his testimony, a charge predicated upon the jury's belief of his innocence of the crime, was abstract and otherwise erroneous.—*Fuller v. State*, 35.

Same; Argumentative Instructions.—An instruction directing the jury that they may look to the fact that the pistol used in killing deceased was deceased's pistol and not defendant's in fixing the grade of the homicide, was properly refused as being argumentative.—*Outler v. State*, 39.

Criminal Law; Trial; Instruction; Misleading.—There being other evidence from which the jury was authorized to return a verdict of guilt, a charge which asserts that if the testimony of a named witness, or any part thereof, was wilfully false, the jury could disregard it and find accused not guilty, was misleading and properly refused.—*Ib.* 39.

Same; Affirmative Instruction.—Where the evidence affords an inference against defendant's innocence, he is not entitled to the general affirmative charge.—*Hargrove v. State*, 97.

(b) As to Evidence.

Criminal Law; Province of Jury.—Charges asserting that the evidence fails to show a conspiracy between defendant and certain others to take deceased life; and that if the jury believe the evidence, defendant could not be convicted on the theory that he had entered into a conspiracy, are invasive of the province of the jury and are properly refused.—*Hanners v. State*, 27.

Same; Instructions as to Evidence.—A charge asserting that the evidence of a witness taken on preliminary examination was not the evidence the jury should consider as his on this trial, but the jury should take the written showing signed by defendant as being the evidence the witness would give, if present, and give it the same weight as if the witness had testified on the stand, in effect excluded a portion of the evidence from the consideration of the jury and was properly refused.—*Ib.* 27.

Same; Affirmative Charge; Denial.—It is always proper to refuse to defendant the general charge where there is evidence sufficient to warrant a conviction.—*Gordon v. State*, 42.

Same; Instruction; Circumstantial Evidence.—The evidence not being entirely circumstantial, an instruction was properly refused which asserted that in order to warrant a conviction on circumstantial evidence, the circumstances must be so multiplied as to increase the probability of defendant's guilt to a definite extent beyond the reach of mere calculation.—*Ib.* 42.

CRIMINAL LAW—Continued.

Same; Weight of Evidence.—A charge which asserts that defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of his innocence, is misleading as tending to require a belief on the part of the jury that the evidence of guilt must be conclusive. (LYSON and SIMPSON, JJ., dissent.)—*Ib.* 42.

Same; Presumption of Innocence.—Presumption of innocence being a conclusion of law, having no relation to the condition of mind produced by proof, an instruction was properly refused which asserted that, if after examining and weighing all of the evidence carefully a presumption of innocence in favor of accused was left in the minds of the jury, they should acquit defendant.—*Ib.* 42.

Same; Circumstantial Evidence.—A charge asserting that circumstantial evidence is wholly inferior in cogency, force and effect to direct evidence, is properly refused.—*Ib.* 42.

Same.—An instruction is misleading and properly refused which asserts that the evidence in the case should be almost as clear and convincing as direct evidence, in order to justify a conviction, where there was direct evidence in the case.—*Ib.* 42.

Same; Witnesses; Weight of Testimony.—A charge asserting that the jury should be very cautious and careful in weighing the testimony of a named witness is invasive of the province of the jury and properly refused.—*Ib.* 42.

Same; Instruction; Ignoring Evidence; Degrees of Homicide.—Where the evidence in the case would justify a conviction of murder in the first degree, a charge asserting that the defendant could be convicted of no higher degree than murder in the second degree was properly refused.—*Ib.* 42.

Same; Instructions; Alibi.—A charge asserting that where a defendant attempts to prove an alibi the burden is on him to successfully prove it, is a correct statement of law.—*Parham State.* 57.

Same; Instructions; Disregarding Defendant's Testimony.—An instruction is proper that asserts that if the jury believe from the evidence that defendant has wilfully sworn falsely as to any material matter, they may, in their discretion, disregard all of his testimony.—*Ib.* 57.

Same; Instructions; Degree of Proof.—A charge asserting that there should not be a conviction unless, to a moral certainty, the evidence excludes every other reasonable hypothesis than that of guilt of defendant, and no matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of defendant is not shown by that full measure of proof that the law requires, is erroneous as requiring a too high degree of proof.—*Ib.* 57.

Same; Instructions; Circumstantial Evidence.—A charge asserting that one accused of crime should not be convicted on circumstantial evidence, unless such evidence shows, by a full measure of proof, beyond a reasonable doubt, that defendant is guilty, and such proof is always insufficient unless it excludes to a moral certainty every reasonable supposition or hypothesis arising out of all the evidence, but that of defendant's guilt; and no matter how strong the circumstances if they can be reconciled by any theory, generated by all the evidence that some one else may have committed the crime, then defendant is not shown to be guilty by that full measure of proof that the law demands, requires a too high degree of proof, and is properly refused.—*Parham v. State.* 57.

CRIMINAL LAW—Continued.

Same; Instructions; Invading Province of jury.—Charges asserting that there is not sufficient evidence of certain facts, and that there is no evidence before the jury that deceased was murdered, was properly refused as invasive of the province of the jury.—*Ib.* 57.

Same; Instructions; Degree of Proof.—A charge asserting that before defendant can be convicted the evidence should be as strong as the positive testimony of one credible witness, who proves beyond all reasonable doubt the guilt of defendant, is erroneous.—*Ib.* 57.

Same; Instructions; Impeachment of Witness.—An instruction asserting that if the jury did not believe from all the evidence, that the witness made the contradictory statements attributed to him, then such witness was not impeached, was correct and improperly refused.—*Hammond v. State.* 79.

Same; Credibility of Witness.—A charge asserting that if the State's witnesses had exhibited bias against the defendant or anger, and satisfied the jury that they had not testified truly, and that they were not worthy of belief, and the jury thought their testimony should be disregarded, the jury might discard it altogether, is correct and its refusal error.—*Ib.* 79.

Same.—A charge asserting that if upon all the evidence the jury believed that the testimony as to the good character of certain witnesses is sufficient to overcome the impeaching testimony against them, the jury should weigh their testimony in the light of this proof of good character along with all the other evidence, falls within the exception to the rule against giving undue prominence to particular parts of the evidence, and the rule that charges should not be argumentative, is a correct charge and its refusal error.—*Ib.* 79.

Same; Interest of Defendant as a Witness.—A charge asserting that the jury must consider the testimony of the defendant in the light of the interest he has in the result of the prosecution, was properly given.—*Ib.* 79.

Criminal Law: Instructions; Credibility of Witnesses.—Instructions asserting that if the witnesses testifying to the crime were in the opinion of the jury unreliable, and not worthy of belief, the accused could not be convicted are properly refused, as pretermittting corroboration by other evidence.—*Hamilton v. State.* 110.

Same.—A witness may swear falsely to a material fact unintentionally, hence a charge which asserts that if any witness was shown to have sworn falsely to any material fact, his testimony might be disregarded, was properly refused.—*Ib.* 110.

(c) Reasonable Doubt.

Same; Instruction as to Duty of Jurors; Reasonable Doubt.—A charge requiring an acquittal if either or any one of the jury have a reasonable doubt of the defendant's guilt, is erroneous as requiring a verdict upon the belief of one juror.—*Outler v. State.* 39.

Same.—An instruction that unless the jury, after carefully weighing all the evidence, cannot feel an abiding conviction of defendant's guilt, they must acquit, was properly refused.—*Gordon v. State.* 42.

Same; Reasonable Doubt.—An instruction requiring an acquittal unless the jury believed beyond "all doubt" that the defendant was guilty requires a too high degree of proof, and is properly refused.—*Ib.* 42.

Same; Instruction; Reasonable Doubt.—A charge which asserts that if the evidence did not establish the truth of the charge to

CRIMINAL LAW—*Continued.*

a moral certainty and beyond a reasonable doubt, that is, to a certainty that convinced and directed the jury's understanding and satisfied their reason and judgment, they must acquit, required a too high degree of proof.—*Gordon v. State*, 42.

Same; Motive; Reasonable Doubt.—A charge which asserts that if the state had failed to show a motive on defendant's part to commit the offense, and his guilt was not clearly proven, then the absence of a motive, considered in connection with all the evidence in the case, might generate in the minds of the jury a reasonable doubt of defendant's guilt, was erroneous and properly refused.—*Glass v. State*, 50.

Criminal Law; Instructions; Reasonable Doubt.—Charges that if the jury believe from the evidence beyond a reasonable doubt that defendant is guilty; though they also believe it is possible he may not be guilty, they must convict; and that the doubt to warrant an acquittal must be actual and substantial, not a mere possible doubt, are correct and properly given.—*Parham v. State*, 57.

Same.—When a charge is correct in stating that "beyond a reasonable doubt" does not mean absolute certainty, it is not rendered so erroneous as to work a reversal, by the added assertion that there is no such thing in human affairs as absolute certainty.—*Ib.* 57.

Same.—A charge asserting that if the jury are reasonably doubtful as to the proof of any material allegation in the indictment they must acquit, is erroneous and properly refused.—*Ib.* 57.

Same.—A charge asserting that if, after considering all the evidence, the jury have a fixed conviction of the truth of the charge, that they are satisfied beyond a reasonable doubt, and it is their duty to convict, is correct.—*Ib.* 57.

Same; Instructions; Reasonable Doubt.—A charge asserting that it makes no difference in what language the definition of a reasonable doubt is clothed, when boiled down and brought to its last analysis it means no more or less than a doubt growing up out of all the evidence for which the jury can give a reason, as contradistinguished from a mere possibility, while calculated to mislead and confuse the jury, and the better practice is to refuse such charges, does not constitute reversible error.—*Hammond v. State*, 79.

§ 9. Trial; Evidence.

Criminal Law; Trial; Evidence.—Evidence incompetent when offered is cured of error if it is afterwards rendered competent.—*Hanners v. State*, 27.

Same; Limitation of Evidence; Duty of Defendant to Request Limitation.—Where certain evidence is admissible for a particular purpose only, if defendant desired that it should be limited to that purpose, he should ask instructions from the court to the jury as to such limitation.—*Ib.* 27.

Same; Review; Rulings on Evidence.—It not plainly appearing from the question that evidence sought to be elicited by it was relevant and material, in order to have a review of the sustaining of objection to the question, it should appear of record what answer was expected.—*Parham v. State*, 57.

Criminal Law; Trial; Order of Proof.—It is within the discretion of the court to permit a witness, over defendant's objection, to be re-examined in rebuttal.—*Cross v. State*, 125.

Same; Evidence; Competency Established by Admission of Other Evidence.—Where it was shown by defendant that the roadway in question was the only way of reaching the railroad sta-

CRIMINAL LAW—Continued.

tion from defendant's saw mill, it was competent to permit evidence that prosecutor, after closing old way, cut a new way which was used by people to reach points to which the old roadway led.—*Ib.* 125.

(b) Argument of Counsel.

Same; Trial; Argument of Counsel.—Defendant's counsel in argument asked why an alleged co-conspirator was never indicted, and why the State had not produced him. Replying, the solicitor said that if any one was expected to produce such co-conspirator, it was the defendant, as they were on friendly terms and it would be easier for the defendant and the co-conspirator to prove it if no conspiracy existed. Held, that while the remarks of defendant's attorney were improper and could have been excluded, it was not error not to exclude the reply thereto, on the theory that illegal evidence may be rebutted by evidence of the same character.—*Hanners v. State* 27.

Same; Trial; Remarks of Counsel.—The solicitor said to the jury: "You can take that gun, which is in evidence and try the gun on the two shells in evidence, and put one shell in each barrel of the gun and snap it and see if it does not make the same impression on the caps of the two shells, and in the same place on the caps as is made on the caps of the two empty shells in evidence; and I invite you, gentlemen, to make the experiment when you retire to the room to make your verdict." Held, not error to refuse to exclude these remarks in view of the tendencies of the evidence.—*Fuller v. State*, 35.

Same; Remarks of Counsel.—It was improper not to exclude remarks of the solicitor that defendant had killed deceased and left his three orphan children to charity or his friends, in the absence of such evidence.—*Glass v. State*, 50.

§ 6. Pleading; Time of Filing.

Criminal Law; Plea of Insanity; Time.—A plea of insanity not interposed at the time of arraignment and not offered until after the jury had been empanelled, when not accompanied by a statement concerning the proof expected to be offered in support of it, may be properly stricken by the trial court without an abuse of discretion, although it is made to appear that at the time of arraignment defendant's attorneys were strangers to him and had no means of ascertaining that such plea should be filed.—*Gordon v. State*, 42.

§ 7. Indictment.

Criminal Law; Indictment; Notice to Accused.—The defendant need not have notice that an indictment has been returned against him, previous to arraignment, nor need a copy if it be served upon him prior to that time.—*Dix v. State*, 70.

Criminal Law; Indictment; Counts; Verdict.—Where an indictment contained a count for burglary, and one for grand larceny, which latter count is defective, and a verdict was rendered finding the defendant guilty on both counts, and he was sentenced only for burglary, he was not prejudiced by the defects in the second count.—*Burrow v. State*, 114.

§ 8. Verdict; Return of.

Same; Verdict, Return of; Personal Presence of Defendant.—While a verdict of guilty, in felony cases, cannot be returned in the absence of defendant, whose personal presence must affirmatively appear of record, it is not necessary that the record should state in direct terms that the defendant was present at the rendition of the verdict, and during all the previous

CRIMINAL LAW—*Continued.*

proceedings of the trial. Where the record recites the presence of the defendant at the time of arraignment, the continuance of the trial from day to day and that defendant was personally present when sentence was pronounced, it sufficiently appears by implication that defendant was personally present from arraignment during the entire sitting of the court to the rendition of the verdict.—*Dix v. State*, 70.

Criminal Law; Verdict; Polling Jury.—Either party has the right to poll the jury in a criminal case.—*Stewart v. State*, 137.

Same; Waiver.—The accused may waive the right to poll the jury in a misdemeanor case.—*Ib.* 137.

Same; Irregularity in Verdict.—The jury, while the court was recessed, made their verdict, wrote it upon the indictment and handed it to the clerk of the court and dispersed; when the court reconvened the judge refused to receive the verdict and sent the jury to their room to make a verdict. All this was done without the consent of the defendant. Held, that as the judge refused to receive the verdict made and returned during the recess of the court, the dispersing of the jury did not amount to an acquittal, but was such an irregularity as rendered the verdict a nullity and it would not support a judgment of conviction.—*Ib.* 137.

Criminal Law; Verdict; Rendition; Presence of Accused.—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and in the presence of the accused.—*Wells v. State*, 140.

Same; Felonies; Records.—The record must affirmatively show the personal presence of accused when the verdict is rendered in all cases of felony.—*Ib.* 140.

Same; Reception of Verdict; Recess.—It is error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused, even with the consent of his counsel.—*Ib.* 140.

Same; Acquittal.—In a misdemeanor or felony case, where the verdict is received and the jury discharged in the absence of accused, such proceedings operated as an acquittal of the accused, and cannot be cured by reassembling the jury, after they have dispersed.—*Ib.* 140.

Same; Waiver; Misdemeanors.—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused.—*Ib.* 140.

§ 9. Affidavit.

Criminal Law; Affidavit; Wrongful Sale of Liquor.—Under the provisions of Section 3, of Acts of 1896-7, p. 124, the clerk of the circuit court, who is ex-officio clerk of the county court of Shelby county, has authority to take affidavit as the basis for a warrant in a prosecution for violation of the liquor laws.—*Roland v. State*, 149.

Same; Lost Affidavit; Substitution.—The county court has power to substitute an affidavit which has been lost, and on which a prosecution for the illegal sale of liquor was based.—*Ib.* 149.

Same; Trial; Warrant.—The fact that several terms of the court had elapsed since the issuance of the warrant, and that the warrant was functus officio, did not affect the court's power to try the defendant where the defendant was properly before the court.—*Ib.* 149.

§ 10. Bail.

Criminal Law; Bail; Appeal by State; Exceptions.—It is not necessary to show on an appeal by the State from a judgment

CRIMINAL LAW—Continued.

on habeas corpus admitting a prisoner to bail, under Section 4314, Code 1896, that an exception was reserved on the trial to the rendition of the judgment, especially when the judgment recites notice of appeal given by the State at the time of the rendition of the judgment.—*State v. Sikes*, 160.

Same; Time.—Where the bill of exceptions was signed within the time fixed by the court, and within the thirty days allowed by Section 4126, Code 1896, it was signed in time and the appeal taken in time.—*Ib.* 160.

CUSTOM AND USAGE.

Customs and Usages; Knowledge of Customs; Presumption.—It cannot be presumed that a manufacturer whose place of business was in North Carolina had knowledge of customs prevailing in one point in Alabama.—*Gould v. Cates Chair Co.*, 629.

Same; Evidence; Admissibility.—As affecting the principal of salesmen, proof of a custom obtaining among such salesmen alone, is inadmissible.—*Ib.* 629.

DAMAGES.

See Banks and Banking.

See Trover and Case.

DEDICATION.

§ 1. Acceptance.

Dedication; Acceptance; Official Acts; Public Use.—Acceptance of a dedication may be by formal acts of the municipal authorities or others authorized, or it may be inferred from long public use.—*City of Mobile v. Fowler*, 403.

Dedication; Platting and Selling Land.—The platting of land showing streets and avenues and the selling of lots with reference to the plat and the streets and avenues thereon, when done by the owner, is a complete dedication of the streets and avenues.—*Ib.* 403.

Same; Evidence of Dedication.—The fact that a street appears on a map, which is referred to in some of several deeds to land in its vicinity, is not of its self equivalent to dedication.—*Ib.* 403.

Same; Prescription; Evidence.—Testimony that certain lands formed a street before it was fenced in, without more, is insufficient to show that it was used for such length of time as to become a public highway by dedication and acceptance.—*Ib.* 403.

Same; Necessity of Acceptance.—In order to render a dedication such, and irrevocable, it must be accepted.—*Ib.* 403.

DEEDS.

§ 1. Construction.

Deeds; Construction; Lands Conveyed.—Where the deed stated that the land conveyed contained 160 acres and described it as south half and northeast fourth of northwest fourth, Sec. 29, and an undivided half interest in southwest fourth of southwest fourth, Sec. 28, and south half of southwest fourth of northwest fourth, Sec. 23, and the amendment alleges that it should be described as south half of northwest fourth, northeast fourth of northwest fourth, Sec. 29; south half of southwest fourth of northwest fourth, Sec. 23, and half interest in southwest fourth of southwest fourth, Sec. 28, held, that to harmonize the recitals of the deed and make it speak the truth in its averments, that construction that makes the description and the given number of acres agree should be adopted.—*Reynolds v. Lawrence*, 216.

DEEDS—*Continued*.

§ 2. DESCRIPTION.

Deeds; Description.—A deed describing land so as it can be made certain by extrinsic evidence is not void for uncertainty of description.—*Thomas v. Ccwin*, 478.

DEPOSITIONS.

See Witnesses, Evidence.

Depositions.—A commissioner is not required to take down the answer of witness in his own handwriting. It is enough if he comply with Section 1841, Code 1896, and have it done by an impartial person or by the witness himself.—*Ebersole v. So. B. & L. Asso.*, 177.

DESCENT AND DISTRIBUTION.

See Executors and Administrators.

§ 1. Liability for Debts of Ancestor.

Descent and Distribution; Debts of Intestate; Liability of Heirs.—A claim of damages for breach of covenant of life tenant will not lie against the heirs, but must be presented in due course of administration, and remedy sought against the property of decedent.—*C. W. Zimmerman Mfg. Co. v. Wilson*, 275.

Same; Actions; Equity.—A court of chancery cannot by a species of equitable attachment, or garnishment, seize and hold money coming to the heirs from the father's estate, where the complainant had no claim assertable in equity against the heirs for breach of contract to defend title made by the mother, the life tenant, in the sale of timber, to satisfy a decree that complainant could not obtain.—*Ib.* 275.

DISCOVERY OF ASSETS.

See Equity.

Discovery; Equity; Jurisdiction.—Equity has no jurisdiction to entertain a bill for discovery, unless it is alleged that the one seeking discovery cannot prove the facts without the answer of the defendant.—*Hulsey v. Walker Co.*, 501.

Creditors Suits; Discovery of Assets; Parties; Nature of Claim.—The fact that some of the claims of some of the creditors were in the shape of notes with waiver of exemptions as to personal property does not render the court unable to grant relief under §§ 819, 820, Code 1896.—*Ethridge Bros. v. Swann. et al.*, 535.

ELECTION OF REMEDIES.

Election of Remedies; Grounds.—The party must have two actual inconsistent remedies to make a case for the application of election of remedies.—*Southern Ry. Co. v. City of Atlanta*, 652.

Money Received; Conversation; Waiver of Tort.—Until there has been a sale of the property converted by the tortfeasor, the owner of the property cannot waive the tort and sue for money had and received.—*Ib.* 653.

ELECTRIC COMPANIES.

See Municipal Corporations.

§ 1. Franchise.

Electric Companies; Franchise; Arbitration; Agreement.—Where an electric company accepts a franchise under an agreement that its poles may be used by another company for a compensation to be agreed upon between the companies, and in case of disagreement the compensation to be decided by the city electrician, it is bound, either to agree as to the compen-

ELECTRIC COMPANIES.—Continued.

sation, or accept the arbitrament of the city electrician, unless such arbitrament is shown to be arbitrary or corrupt.—*Mfg. L. & W. P. Co. v. Citizens L. H. & P. Co.*, 359.

EMBEZZLEMENT.

Embezzlement; Venue; Jury Question.—Where the proof showed that the money was delivered to defendant in the county of C. to be deposited in a bank in the county of T. and part of such money was deposited in said bank, the trial court could not say, as a matter of law, that the embezzlement occurred in the county of C.—*Knight v. State*, 104.

Same; Common Carrier.—The fact that defendant was accustomed to carry money for prosecutor from prosecutor's place of business to a bank in another town for deposit, for which prosecutor paid defendant did not constitute defendant a common carrier, and a charge asserting that defendant was such a carrier was properly refused.—*Ib.* 104.

EMINENT DOMAIN.**§ 1. Telephone Lines.**

Eminent Domain; Use of Highway for Telephone Line.—The construction of a telephone line is not an additional burden or servitude on the land entitling the abutting owner to compensation. (Tyson & Denson, JJ., dissent.)—*Hobbs v. Long Dis. Tel. & Tel. Co.*, 393.

EQUITY.**§ 1. Bill.**

Bill; Allegation; Sufficiency.—A bill alleging that complainant purchased of respondent, who was the owner of Sections 20 and 21, Section 20, and received a deed to all of Section 20, named township and range; that while said two sections belonged to respondent, or those under whom she claimed, the boundary line between the sections was destroyed; that such destruction was caused by the negligence of respondent, or those under whom she claimed; that the boundary was obliterated at the time of the purchase, which fact was unknown to complainant; that respondent continues to own Sec. 21; that respondent, at the time of the sale, did not point out the boundary to complainant, and refuses to do so, although requested; that complainant has attempted to have the boundary marked by a surveyor, but has been prevented by threats of violence from respondent, makes a case for equitable interference and establishment of boundary, respondent's acts being a fraud upon complainant.—*Hays v. Bouchelle*, 212.

Equity; Bill; Multifariousness.—Complainant and G. purchased part of a plat of land from W., and complainant and G. went into possession of certain parts of the plat under their deeds, W. retaining the remainder; on account of inaccuracies in descriptions there resulted a confusion of boundaries on the face of the paper title, and G., claiming her deed conveyed the land occupied by complainant, commenced a suit in ejectment to recover it; whereupon complainant filed his bill against G. and W. and wife, original grantors of both complainant and G., to enjoin the ejectment suit and to correct errors in description in both deeds. Held, bill was properly filed as preventing a multiplicity of suits, and was not demurrable for multifariousness.—*Sicard v. Gullyon*, 239.

Equity; Bill; Omitting Averment; Supplying by Prayer.—Averments necessary to make out a case cannot be supplied by the prayer of a bill, where such averments are omitted in the bill proper.—*Jacoby v. Funkhouser*, 254.

EQUITY.—Continued.

Equity; Pleading; Bill; Sufficiency; Dismissal.—The allegations of a bill which is clearly susceptible to the construction that the right of the complainant is predicated upon the injury to his property interest in the lot abutting the street, the grade of which is proposed to be changed, and which the bill showed would be substantially injured, although susceptible of the construction that he based his relief to some extent on his supposed property interest in the street, does not render the bill subject to dismissal for want of equity, the defect being an amendable one.—*Town of New Decatur v. Scharfenburg*, 367.

Same; Pleading; Repugnancy.—A bill is not repugnant that seeks to foreclose a mortgage, or in the alternative, to enforce a vendor's lien.—*Winkleman v. White*, 481.

Equity; Pleading; Bill; Multifariousness.—A bill is multifarious and subject to demurrer, as such, that seeks to enforce a resulting trust in land, and, on independent averment, to have alimony decreed.—*Prickett v. Prickett*, 494.

Same; Venue; Mode of Objection; Demurrer.—Where the bill affirmatively shows that the respondent is sued out of the county of his residence, the objection may be raised by demurrer.—*Id.* 494.

Same; Dismissal of Bill; Residence of Parties; Amendment.—Where the bill was originally to have a resulting trust declared in land, and to have alimony decreed, and it was filed in the county where the land was situated, and it was afterwards amended by eliminating the averment seeking to enforce the resulting trust, it was properly dismissed because not filed in the county where respondent resided.—*Id.* 494.

§ 2. Confused or Obliterated Boundaries.

Boundaries; Establishment; Equitable Jurisdiction.—The jurisdiction of chancery to establish disputed boundaries not being original or independent, a court of chancery will not undertake to establish obscured or confused boundaries in the absence of some equity superinduced by the acts of the parties, or those through whom they claim.—*Hays v. Bouchelle*, 212.

§ 3. Jurisdiction.

Equity; Vendor and Purchaser; Failure of Title; Equitable Relief.—Equity is without power to grant relief on account of a defect in the title, where the land is sold and conveyed with express covenants of warranty, unless the vendor is insolvent; but if there is a fraud or failure of title and the vendor is insolvent, equity will grant relief whether the purchaser is in possession or not.—*Yarbrough v. Thornton*, 221.

§ 4. Cross Bills.

Equity; Cross Bill; Dismissal of Original Bill; Effect.—Where the cross bill prays for affirmative relief, and alleges additional facts relating to the subject matter of the original bill, not therein alleged, the dismissal of the original bill for want of equity does not carry the cross bill with it, but the cross bill may be retained for the purpose of granting the relief sought therein.—*Webster v. Debardeleben*, 280.

Equity; Cross Bill; Propriety.—A cross bill is proper and allowable whenever it becomes necessary to do justice between the parties and adjust all the equities between them growing out of and connected with the subject matter of the original bill.—*Ashe-Carson Co. v. Bonifay*, 377.

Same; New Issues.—In a suit in equity new issues relating to the subject matter of the original bill, may be brought forward by cross bill.—*Id.* 377.

EQUITY.—Continued.

Same; Elements.—It is not necessary that a cross bill should show any grounds of equity or ask equitable relief, as against the complainant in the original bill. It is sufficient if the matters therein relate to the subject matter of the original bill, in which case purely legal claims may be presented by cross bill. *Ib.* 377.

Same; Affirmative Relief; Answer; Cross Bill.—Affirmative relief cannot be obtained under an answer. It must be asked by cross bill.—*Ib.* 377.

Same; Recoupment; Damages.—The bill alleged the leasing of certain lands for turpentine purposes from respondent, the violation of the lease by respondents in cutting down the trees that had been boxed and were being used for turpentine purposes, praying damages for the trespass already committed and an injunction to restrain further trespass. Respondents filed their cross bill alleging that they purchased the land for the timber thereon, and leased it to complainants for turpentine purposes and that complainants had violated the terms of the lease by boxing trees smaller than 10 inches at the butt, a large per cent of which had died and others blown down, causing loss to respondents of a named sum, and claiming judgment therefor. Held, the damages sought to be recouped were of the same class as those claimed in the original bill, and therefore relating exclusively to the subject matter of the bill.—*Ib.* 377.

§ 5. Pleadings.**(a) Inconsistent Pleadings.**

Equity; Pleading; Bill; Inconsistency and Repugnancy.—Without being multifarious a bill may be inconsistent and repugnant in its averment.—*Ellis v. Crawford*, 294.

Same; Wills; Contest.—The bill avers that the will was not attested by two witnesses, while the copy of the will attached as an exhibit thereto discloses two subscribing witnesses.—Held, not to render the bill repugnant in averments.—*Ib.* 294.

Same; Pleading; Demurrer.—In a suit in chancery to contest a will after its admission to probate where it was sought, in addition to setting aside the will, to have a deed from a legatee set aside, and also an injunction against the legatees grantees to restrain them from disposing of the property, the extent and character of complainant's relief being determinable in the final decree, such question could not properly be raised by a demurrer to the bill.—*Ib.* 294.

Same; Pleading; Demurrer to Bill.—If the complainant was entitled to any relief under the bill, a demurrer addressed to the bill as a whole was properly overruled.—*Bressler v. Bloom*, 504.

(c) Departure.

Pleading; Amendment of Bill; Departure.—The bill, seeking cancellation of a mortgage, alleged that while complainant was being pressed by creditors, respondent, complainant's brother, in whom she reposed confidence, and who managed her business, advised complainant to execute a bogus mortgage to him. By an amendment such allegation were stricken from the bill and superceded by sections which omitted all statements about complainant being pressed by claims, but alleged that respondent advised her, that to protect her rights in her land, and to preserve her homestead for herself and minor children, it was necessary for her to give him a mortgage. By other amend-

EQUITY.—*Continued.*

ment, it is alleged that respondent unduly influenced complainant, and that it was not necessary for complainant to have given the mortgage to protect her rights in the land and to preserve her homestead. Held, the amendments were not departures from the original bill, as the amendments were consistent with and germane to the idea that the claims did exist, and that the giving of the mortgage was unnecessary, either because the claims could have been taken care of otherwise, or because complainant could have protected her homestead under the statute.—*Phillips v. Bradford*, 346.

(d) Setting for Hearing.

Equity; Setting Plea for Hearing; Effect.—The setting down of a plea to a bill for hearing on its sufficiency is an admission of the truth of all the facts alleged for the purpose of invoking judgment as to whether the facts constitute a defense.—*Town of New Decatur v. Scharfenberg*, 367.

(e) Pleas.

Same; Pleas; Necessity of Verification.—In the absence of any rule or statute requiring it pleas to a bill in chancery need not be verified.—*Town of New Decatur v. Scharfenberg*, 367.

Same; Duplicitous.—A plea is not duplicitous which does not contain independent sets of facts, each constituting a sufficient defense.—*Ib.* 367.

(f) Motions to Dismiss.

Equity; Pleadings; Motion to Dismiss.—On motion to dismiss for want of equity all amendable defects of the bill must be taken as cured, but this rule does not mean that the bill is to be considered as amended so as to give it equity by the averment of new, additional or independent facts; but only as to amendable defects apparent from the bill from its averments.—*Stephenson v. Atlas Coal Co.*, 432.

Same; Amendment; Time.—Time will not be allowed for amendment after decree on motion to dismiss for want of equity.—*Ib.* 432.

(g) Noting Pleadings.

Equity; Pleas; Joinder of Issue.—Under chancery Rule 76 it is not necessary to note pleadings in the submission of a cause; and in the absence of demurrer or replication issue will be treated as taken on pleas in the answer.—*Sellers v. Farmer*, 446.

§ 6. Clean Hands.

Equity; Fraud of Complainant; Effect; Existence.—The bill was not subject to demurrer on the grounds that complainant was guilty of fraud, or that the parties were in pari delicto.—*Phillips v. Bradford*, 346.

Same; Clean Hands.—The complainants having violating the terms of the lease by boxing trees under 10 inches at the butt, they were not entitled to relief in equity under the contract of lease against the lessors for their alleged trespass in cutting and hauling away boxed trees for lumber.—*Ash-Carson Co. v. Bonifay*, 377.

§ 7. Bill of Review.

Equity; Bill of Review; Presumptions; Record.—The fact that the record was silent as to the filing of the bond as required by Section 759, Code 1896, before the sale, the defendant having been brought in by publication only, and the sale having tak-

EQUITY.—*Continued.*

en place within twelve months after the decree, is no ground for reviewing the decree of foreclosure; the presumption being that the bond was given.—*Winkleman v. White*. 481.

Equity; Bill of Review; Scope of Review; Notice of Reference.—

The failure to give a defendant notice of a reference in a foreclosure suit is a mere irregularity, which cannot be taken advantage of by bill for review.—*Ib.* 481.

Same; Form of Decree.—The fact that the foreclosure decree omitted the direction that a copy of the same be sent to a defendant is not ground for reviewing the decree, on a bill for review.—*Ib.* 481.

Same; Repugnancy of Bill.—It is not a good objection, on a bill for review, that a bill for foreclosure of a mortgage or to enforce a vendor's lien was filed in a double aspect and that the relief in each would not be identical.—*Ib.* 481.

Same; Bill of Review; Pleading; Presumption.—A bill of review brought more than twelve months after the decree does not show error in rendering the decree of foreclosure, sought to be reviewed, because the bill in the foreclosure suit did not contain averment as to the residence of a husband who failed to join in his wife's mortgage; there being no presumption that the husband was a resident of this State, and that the mortgage was invalid under Section 2348, Code 1896, especially in view of the fact that the decree becomes absolute as to a defendant properly brought in after the lapse of twelve months, under Section 753, Code 1896.—*Ib.* 481.

Same; Allowance of Attorney's Fee.—This court being unable to know the evidence on which the register based his report, or to review it if known, cannot say, on a bill for review, that there was error apparent in the allowance of a five hundred dollar attorney's fee for foreclosure of mortgage. A wrong conclusion drawn by the court from the evidence will not reverse the decree, on bill for review.—*Ib.* 481.

Same; Signature to the Bill.—The fact that the foot-note to the bill for foreclosure was not signed by counsel, being, as it was, an amendable defect, and a defect waived unless taken advantage of by demurrer, and it not appearing that demurrer was filed thereto, is not ground to review the decree of foreclosure, on bill for review.—*Ib.* 481.

§ 8. Removal of Estates.

Equity; Jurisdiction; Administration of Estate; Transfer in Equity.—Without assigning any special reason for transferring an estate to the chancery court, any person entitled to share in the distribution of an estate is entitled to have the administration removed from the probate to the chancery court.—*Bresler v. Bloom*. 504.

Same; Rights of Remaindermen.—The fact that the remainder man alleged in his bill, for a removal of the estate from the probate to the chancery court, that the defendant, as administrator, had invested a part of the property bequeathed by the will in other property, and had taken the title thereto in his own name absolutely in disregard of his revisionary rights, will not deny him the relief sought, because the will devised and bequeathed the property to the administrator defendant for his life.—*Ib.* 504.

Courts; Removal of Administration from Probate to Chancery Court.—Legatees or distributees may maintain a bill to remove the administration of the estate from the probate to the chancery court without assigning any cause, general or special, for equitable interposition, where it appears therein that

EQUITY.—Continued.

the probate court has not taken jurisdiction for the special purpose of making a final settlement of the estate.—*Colquit, et al. v. Gill*, 554.

Same; Allegation of Bill.—The bill for removal need not allege that decedent was dead, or that there were assets of the estate in the county, these facts being referable to the grant of letters of administration by the probate court, to which alone § 55, Code 1896, applies.—*Ib.* 554.

ESTOPPEL.**§ 1. Covenant.**

Estoppel; Covenant of Ancestor; Liability of Heirs.—The heirs claiming title independent of the life tenant, cannot be estopped by the mere force of the covenant on their ancestor.—*C. W. Zimmerman Mfg. Co. v. Wilson*, 275.

Estoppel; Representation.—A statement was filed by the insurance corporation under § 1109, Code 1896, showing the corporate assets, etc., the notes were put in as part of the assets of the corporation, and by the statement a continuation of the company's franchise was secured. Held, this fact did not estop the shareholders, who had executed the notes, from denying that they were unconditional obligations.—*Anderson v. Buckley*, 415.

§ 3. Judicial Sale.

Estoppel; Judicial Sale.—The rule that the levy and sale of property by a person in general estops him from denying that the other party has a leviable interest therein, does not extend to the divestiture of rights under previous sales made under a different process.—*Harris, et al. v. Stephenson*, 537.

EVIDENCE.

In Particular Actions and Crimes, see Appropriate Titles.

See Criminal Law, §§ 2 and 5. Witnesses.

§ 1. Parol to Vary Written Instrument.

Evidence; Parol Evidence; Varying Terms of Mortgage; Admissibility.—Parol evidence is admissible to show the consideration and the real nature of the transaction, although the mortgage recites a certain consideration different somewhat from that shown by the parol evidence.—*Ladd v. Lookout Mt. Dis. Co.*, 173.

Evidence; Parol Evidence; Varying Terms of Deed; Patent Ambiguity.—While it is a general rule that patent ambiguity in the face of a deed cannot be made certain by parol testimony, yet, as the deed, and the intention of the parties in making it, must be determined by the court, the court is entitled to all the circumstances attending the parties in making the deed to enable it to arrive at their intention; especially when, as in this case, the ambiguity is of the middle class, partaking of the nature of both latent and patent ambiguities.—*Reynolds, et al. v. Lawrence*, 216.

Same; Description of Property.—Where a deed conveying land described it as north half and northeast fourth of northwest fourth of Section 29, parol evidence was admissible to show that the parties intended to convey north half of northwest fourth and northeast fourth of northwest fourth of Section 29.—*Ib.* 216.

Evidence; Parol Evidence; Principal and Surety.—Parol evidence is admissible to show that the wife signed as surety only a note and mortgage executed by the husband and wife.—*Gibson v. Wallace*, 322.

EVIDENCE—Continued.

Evidence; Written Contracts; Variance by Parol.—It is not offending the rule against varying written contracts by parol to permit evidence to be introduced to show that two written contracts in evidence related to one and the same transaction and were, in effect, but one contract.—*Rock Island S. & D. Works v. Moore-Handley Hdw. Co.*, 581.

Evidence; Parol Evidence to Vary Written Contract; Contract of Sale.—When the contract requires that the seller deliver coal by wagons to the buyer's furnaces, and that the buyer pay for it a certain sum per bushel of 2748 cubic inches, to be measured in cabs of the buyer at its furnaces, such contract is complete and cannot be varied or explained by proof of custom or usage.—*Shelby Iron Co. v. Dupree*, 602.

§ 2. Weight.

Evidence; Verbal Admissions; Weight.—The rule that evidence of verbal admissions is to be received with caution is emphasized when the witnesses disagree as to the admission among themselves in their testimony on direct and cross and after the lapse of some two years.—*Ladd v. Lookout Mt. Dis. Co.*, 173.

§ 3. Best Evidence.

Evidence; Best Evidence.—It is permissible to permit a witness to state the meaning of the cypher words used in the telegram, if he knew them, without producing the cypher code or key.—*McClesky & Whitman v. Howell Cotton Co.*, 573.

Evidence; Admissibility; Documentary Evidence; Preliminary Authentication.—It being shown without objection that certain writs of attachment were issued and that the sheriff seized certain goods under them, this was sufficient preliminary proof of the authenticity of the writs to warrant their admission in evidence.—*Ryan, et al. v. Young*, 660.

Same; Judicial Knowledge; Official Signatures.—The courts judicially know whether the officer by whom a writ of attachment purports to have been issued was a commissioned officer, and they know the genuineness of his signature; and this notwithstanding that a successor to such officer who issued the writ has been elected and is performing the duties of the office since the issuance of the writ and before it was offered in evidence.—*Ib.* 660.

§ 4. Foreign Laws; Proof.

Evidence; Foreign Laws; Proof.—The opinion of the court of a foreign state is properly admitted in evidence to show the construction given the statutes of that state.—*Beckley v. U. S. S. & L. Co.*, 195.

§ 5. Burden of Proof.

Evidence; Burden of Proof; Degree of Proof Required.—In a civil case facts in issue need only be shown to the reasonable satisfaction of the jury. It is not necessary to show them to a "reasonably certainty."—*Eagle Iron Co. v. Baugh*, 213.

§ 6. Opinion Evidence.

Evidence; Opinion of Witness; Principal and Agent; Authority of Agent.—A witness who knows the facts may testify that the authority of a traveling salesman of a corporation was limited to taking orders subject to approval by the corporation.—*Gould v. Cates Chair Co.*, 629.

EVIDENCE—Continued.**§ 7. Relevant and Hearsay.***Evidence; Relevancy; Matters Explanatory of Facts in Evidence.*

—The defendants having raised the issue as to whether plaintiff bought the wood, alleged to have been converted, for himself, or as agent for a certain Iron Co., it was competent for plaintiff to show that when he settled with the Iron Co., no credit was allowed him for wood not delivered, as showing the nature of the transactions between plaintiff and the Iron Co.—*Smyley v. Cooper, et al.*, 646.

Same; Hearsay.—It was incompetent to show by witness declarations alleged to have been made by the superintendent of a certain company that S. in purchasing certain wood, was acting for the corporation, although plaintiff introduced evidence tending to show that S. purchased the wood, alleged to have been converted, as agent for plaintiff.—*Ib.* 646.

EXECUTIONS.**§ 1. Sales under.**

Execution; Sale; Deed to Purchaser.—Section 2917, Code of 1896, relating to the execution of deeds to purchasers at judicial sales, applies only to sales made by the sheriff.—*Mc. Graugh v. Deposit Bank*, 229.

Execution; Sale; Setting Aside; Inadequacy of Price.—A bill seeking to set aside a sale of land under execution for inadequacy of price, which shows on its face that, though the sale included all of the tract, the most valuable part had been previously sold under a chancery decree and the sale confirmed, and the bill contained nothing to negative the fact that the amount paid at the execution sale was less than the value of the lands sold, which was not covered by the chancery sale, the bill was demurrable.—*Harris, et al. v. Stephenson*, 537.

§ 2. Wrongful Levy.

Execution; Wrongful Levy; Action; Evidence.—The issue being whether the wood, which was levied on under execution against another, was the property of the plaintiff, it appearing that the wood had been purchased by S. whom plaintiff insisted, was his agent, evidence as to contracts made by S. with other persons, and the marks placed by S. on wood bought for other parties, was admissible.—*Smiley v. Hooper*, 646.

Same; Defenses.—In an action against the sheriff and another for the wrongful conversion of certain wood, by levy and sale under execution against another than plaintiff, proof that plaintiff purchased the wood as the agent of another will defeat recovery, if believed.—*Ib.* 646.

Same; Instructions.—An instruction asserting that unless the jury believed from the evidence that the legal title to the wood was in plaintiff, he could not recover, was correct, in an action for trover.—*Ib.* 646.

EXECUTORS AND ADMINISTRATORS.

See Equity; Removal of Estates.

§ 1. Claims Against Estate.

Executors and Administrators; Claims against Estate.—The presumption is that one rendering service to decedent, who stood in loco parentis to her, does so without the expectation of receiving payment therefor, but the presumption may be overcome by evidence showing a contrary intent between the parties.—*Patterson v. Carter*, 522.

EXECUTORS AND ADMINISTRATORS—*Continued*

Executors and Administrators; Claims against Estate; Evidence; Sufficiency.—In an action for services rendered decedent by a member of her family, the fact that decedent said that she wished plaintiff to have certain property after decedent's death, did not tend to show liability for such services.—*Ib.* 522.

§ 2. Actions Against.

Executors and Administrators; Actions Against; Subsequent Settlement and Discharge; Effect.—A personal representative cannot defeat a suit against her to enforce a liability against the estate, by subsequently thereto ignoring the liability, making a final settlement, surrendering the assets of the estate to the legatees or judge of probate and obtaining a discharge from the probate court finally discharging her from further liability, where it is shown that she had assets sufficient to pay all claims, including demand sued on.—*Odom v. Moore*, 567.

Same; Pleading; Pleas in Bar.—A plea interposed by an executrix asserting that subsequent to the bringing of the action she surrendered all the assets of the estate as required by law, and was discharged from further liability, is a plea in bar of a further maintenance of the action, and not a plea in bar of the suit.—*Ib.* 567.

Same; Actions Against; Replication; Sufficiency.—Where defendant executrix pleaded a subsequent discharge as executrix, and a settlement of the estate, a replication alleging that the claim sued on had been duly filed in the probate court and presented to the executrix, and subsequently thereto sued on, at which time the executrix had sufficient assets to pay the indebtedness of the estate, including plaintiff's claim, and that without declaring the estate insolvent and without paying the claim, the executrix procured an order finally discharging her, was sufficient as a replication to the pleas and to justify the further maintenance of the suit and good against demurrers interposed.—*Ib.* 567.

FRAUD.

Fraud; Pleading.—The facts constituting the fraud must be stated, and a general averment of fraud is insufficient.—*Baker v. Hutchinson*, 636.

FRAUDULENT CONVEYANCES.

See Chattel Mortgages, § 2.

Fraudulent Conveyances; Want of Consideration.—A conveyance of land which expresses a consideration of one dollar and love and affection, made by a father to his children, is voluntary on its face, and void as to its creditors of the grantor.—*Folmar v. Lehman-Durr Co.*, 472.

Fraudulent Conveyances; Actual Fraud; Burden of Proof.—In order to set aside a mortgage, made before complainants' debts were created, for fraud, the burden is on complainants to show actual fraudulent intent participated in by both mortgagor and mortgagee.—*Rike v. Ryan*, 497.

Fraudulent Conveyances; Preferences.—If the debt be bona fide, the payment absolute, and the property conveyed does not materially exceed in value the amount of the debt, a debtor may prefer his creditors.—*Ib.* 497.

Same; Evidence.—A mortgage given in good faith to secure money loaned from time to time, and at a time when the mortgagee had no reason to believe that the mortgagor was em-

FRAUDULENT CONVEYANCES—*Continued.*

barrassed, and while the mortgagor's credit was still good, is not fraudulent.—*Ib.* 497.

Same; Exempt Property.—A conveyance of personal property of less value than the statutory exemption by a debtor, is not subject to attack by creditors.—*Ib.* 497.

GAMING.

Gaming; Offense; Public Place; What Constitutes.—Any playing with cards or dice in or sufficiently near a public highway for the playing to be seen therefrom is within the statute. Playing done which might be seen by a careful observer from the highway, although a casual observer might not see it, is sufficient to constitute the offense.—*Davis v. State*, 117.

Gaming; Prosecution; Evidence; Sufficiency.—Where it appeared that the playing was done at night in a patch of woods about 150 feet from a church where religious services were going on, and about the same distance from the public road; and it further appeared that it could not be seen from the church, and the witnesses did not think it could be seen from the public road, although they could not say that it could not be seen from any point on the road; and it further appeared that the place was not frequented for the purpose of gambling, and that the game stopped as soon as two or three persons from the church, who were attracted by the light of the fire, came up, such evidence was insufficient to show that the place was a public one.—*Bradford v. State*, 118.

Gaming; Prosecution; Burden of Proof.—In a prosecution for betting at a game of cards in a public place, it is on the state to show beyond a reasonable doubt that the place was a public one.—*Ib.* 118.

GIFTS.

Gifts; Burden of Proof.—To establish a gift alleged to have been made by a deceased person, the burden is on the person claiming the gift to show by proof, clear and convincing, that the subject matter had passed to him by valid and effective gift.—*Thomas v. Tilley*, 189.

Same; Gift Inter Vivos; Quantum of Proof.—The same quantum of proof is required to support a gift inter vivos, when not asserted until after the death of the donor, as is required in gift caused mortis.—*Ib.* 189.

Same; Delivery.—To constitute a completed gift of personal property, the article must have been delivered to the donee.—*Ib.* 189.

Same; Evidence; Sufficiency.—While the declarations of the deceased donor are admissible as evidence, they are not sufficient, of themselves, to establish a completed gift.—*Ib.* 189.

Same.—The evidence in this case examined and held insufficient to establish a gift.—*Ib.* 189.

HABEAS CORPUS.

§ 1. Scope and Relief.

Habeas Corpus; Scope of Inquiry.—The inquiry in habeas corpus proceedings is as to the unlawfulness of the detention—the status of the petitioner at the time of the trial—so that changes in the condition of detention between the time the writ was allowed and the time the trial was had formed part of the inquiry, and are to be considered in the decision.—*Ossie v State*, 152.

Same; Relief.—The contract having been annulled before the term of petitioner's sentence had expired, the order in ha-

HABEAS CORPUS.—Continued.

bas corpus should not be an absolute discharge; the order should be a discharge from the custody of the hirer and a remandment to the custody of the jailer until further disposition can be made.—*Ib.* 152.

Criminal Law; Preliminary Proceedings; Commitment.—The judge of the criminal court, as a conservator of the peace, has authority to commit and hold offenders to answer an indictment, and, upon habeas corpus by defendant, it is immaterial whether the mittimus of the committing magistrate was valid or not.—*Wray v. State*, 162.

Habeas Corpus; Hearing; Conduct of Cause.—The state has the right to open and conclude the argument on habeas corpus proceedings.—*Ib.* 162.

Habeas Corpus; Jurisdiction.—The chancellor of the Northeastern Chancery Division, embracing the county of Elmore, has jurisdiction to try, and a petition for habeas corpus for one in prison in the penitentiary in Elmore County, is properly addressed to such chancellor, under Section 4317 of the Code of 1896.—*State v. Fuller*, 164.

Same; Return of Writ; Where Returnable.—Where a habeas corpus writ was granted by the Chancellor of the Northeastern Chancery Division, embracing the County of Elmore, and the writ was granted more than ten days before the time fixed by law for the holding of the circuit court in said County, the writ was properly made returnable before the Chancellor, and he had power to make it returnable to him at Anniston in another County.—*State v. Fuller*, 164.

Same Appeal; Certification of Transcript.—Where writ of habeas corpus was returnable before the Chancellor of the Northeastern Chancery Division, at Anniston, the cause was pending in the Chancery Court of Calhoun County, if pending anywhere, and a record certified on appeal by the Register in Chancery of that Court, and by the Chancellor, is sufficiently certified.—*Ib.* 164.

Habeas Corpus; Questions Determinable.—The defendant cannot complain that Section 31, Acts 1896-7, was violative of the constitutional provision and that the prosecution against him was not properly before the County Court, although no order was made by the Circuit Court transferring the cause to the County Court, but the cause was placed on the docket of the County Court, where the defendant and the solicitor agreed upon an attorney as special judge to try the cause in the County Court, and defendant pleaded to the indictment and was convicted and appealed to the Supreme Court where the judgment was affirmed.—*Ib.* 164.

HIGHWAYS.

§ 1. How Established.

Highways; Public Lands; Prescription.—Under Rev. Stat. U. S. § 2477 (U. S. Comp. St. 1906, p. 1567) a roadway used by the public over public lands for 20 years does not become a public highway by user or prescription, the use being presumed to be permissive, and not adverse to the government.—*Cross v. State*, 125.

Highways; Establishment; Mode.—A highway becomes such only by dedication, prescription, or proper proceedings before and by the courts of County Commissioners or Boards of Revenue.—*Ib.* 125.

§ 2. Work on.

Highways; Work on Public Roads; Temporary Absence.—One temporarily sojourning at the place where he is warned to

HIGHWAYS.—Continued.

work the public road, but who lives elsewhere, and has paid his street tax, is not liable to road duty at the place of his temporary sojourn.—*Taylor v. State*, 131.

Same; Failure to Work; Evidence.—It was competent for defendant to show that he was at the place where he was warned to work the road only temporarily working out a fine and cost his employe paid for him, that his home was elsewhere to which he would return on completing his fine and costs, and that he had paid his street tax to a certain date at the place of his residence, as a defense to a prosecution for failure to work the public roads after warning.—*Ib.* 131.

Same; Road Duty; Liability.—The payment of street tax in an incorporated town or city is in substitution for road duty, and a person cannot be made liable for both for the same period. *Ib.* 131.

§ 3. Obstructions.

Highways; Obstructions; Remedy of Private Persons; Injunctions.

—The owner of private property abutting on a street is entitled to have a public nuisance abated as one suffering special damages therefrom, who is compelled to take a circuitous or round about way along other streets in travelling between his property and the markets and intercourse with the outside world by reason of the stopping up of the abutting streets by dumping slag therein.—*Gloss S. S. & I. Co. v. Johnson*, 384.

HOMICIDE.

See Criminal Law.

§ 1. Instructions Generally.

Homicide; Instruction.—A charge asserting that intent to take the life of the person assaulted was an essential element of the offense, and that unless, if the intent had been consummated, the offense would have been murder, there could be no conviction of a felony; that where there is an assault, the guilt or innocence of the felony necessitates the inquiry, if death had ensued, whether the offense would have been murder, and hence, if there was no intent to murder deceased, but defendant shot to defend himself against an assault endangering his life or which put him in danger of great bodily harm, defendant was not guilty, was bad in form and misleading in not stating the conditions authorizing the conclusion that the defendant acted in self defense.—*Grisham v. State*, 1.

Homicide; Instructions.—A charge instructing the jury that if deceased accused defendant of meddling with or encouraging the difficulty between deceased and another, then defendant had the right to deny such accusation, if it were false, in no uncertain terms, and that if deceased and another were having a difficulty the day deceased was killed, and deceased accused defendant of encouraging the same, it was defendant's duty to emphatically deny such accusation, and that to have been accused of it and not to have denied it would have been a circumstance against him, was properly refused as tending to create in the minds of the jury the idea that defendant was entitled, as a matter of law, to deny the accusation in such manner as to provoke or encourage the difficulty which ensued between them.—*Hanners v. State*, 27.

Same; Co-defendants; Misleading Charges.—Where there were tendencies in the evidence to show a conspiracy between defendant and another, a charge asserting that defendant could

HOMICIDE—*Continued.*

not be convicted unless the evidence established his guilt independent of the other beyond all reasonable doubt was misleading and properly refused.—*Ib.* 27.

Homicide; Instructions.—In a prosecution for homicide where the only defense was a denial of the killing and the evidence made the offense murder or nothing, a charge that if the jury had a reasonable doubt as to whether the killing was done deliberately or premeditatedly, they could not find the defendant guilty of murder in the first degree, and if they had a reasonable doubt as to whether it was done in malice, then they could not find the defendant guilty of murder in either degree, but only of manslaughter, was properly refused.—*Gordon v. State.* 42.

Same; Degrees; Instructions.—It is the duty of the court, under § 4857, Code 1896, to instruct the jury with respect to the degrees of murder, and it is not error for the court to do so on the ground that, under the evidence, the defendant was guilty of murder in the first degree, or nothing.—*Parham v. State.* 57.

Same; Means of Killing; Instructions.—Where one count of the indictment alleged that the means by which the murder was committed was unknown to the grand jury, a charge that if the jury believed from the evidence beyond a reasonable doubt that deceased came to her death at the hands of the defendant, it does not matter what sort of weapon she was killed with, or how it was used, defendant would be guilty under the count, was proper.—*Ib.* 57.

(b) Self Defense.

Homicide; Instructions.—A charge asserting that the necessity that would justify the taking of human life need not be actual, but the circumstances must be such as to impress on the mind of the slayer a reasonable belief that such necessity was impending, is objectionable, in not postulating that the circumstances were such as to reasonably impress, and did impress, the defendant with the belief that he was in great and imminent peril.—*Williams v. State.* 10.

Same; Defense of Habitation.—As against persons attempting to eject defendant under a lawful writ of possession, the rule that a person is entitled to defend his habitation even to the taking of life when invading the same, has no application.—*Ib.* 10.

Homicide; Self Defense; Misleading Instructions.—The evidence being such that the jury might have found that the defendant deliberately shot deceased after the officer had begun to run, an instruction that if the officer presented his pistol at defendant in a threatening manner, and defendant was free from fault in bringing on the difficulty, defendant had the right under the law, to shoot at the officer in self defense, which right was not limited to cases of necessity, real or apparent on account of danger to life or limb, but extended equally to the danger of great bodily harm, was misleading and properly refused.—*Ib.* 10.

Homicide; Instructions; Freedom from Fault.—A charge on self defense which pretermits consideration of defendant's freedom from fault in producing the necessity to take deceased life and of defendant's duty to retreat is properly refused.—*Hanners v. State.* 27.

Homicide; Instructions; Self Defense; Omission of Evidence.—A charge requiring an acquittal if the jury believe that at the time the fatal shot was fired defendant acted upon the honest belief that he was in danger of life or great bodily harm at

HOMICIDE—Continued.

the hands of the deceased, was properly refused as omitting all reference to defendant's freedom from fault in bringing on the difficulty.—*Outler v. State*, 39.

Same; Self Defense; Instructions.—An instruction which asserts that if defendant was at fault in bringing on the difficulty, yet if he withdrew from it in good faith and was departing when deceased walked up to him and either pushed or knocked him down, and got down on him, and it appeared to defendant that he was in danger of great bodily harm, and he could not have retreated, defendant had the right to shoot deceased, was erroneous and properly refused; So, also, was an instruction asserting that if the jury believed that defendant had had no difficulty with deceased, and nothing was said or done by defendant to deceased, and deceased came up to him and shoved or knocked him down, and defendant could not have retreated, and it appeared to defendant that he was in great danger of bodily harm from deceased, then defendant had the right to shoot.—*Glass v. State*, 50.

Same; Justifiable Homicide; Arrest.—A marshal in good faith attempting to arrest, is justified in firing first when the offender was armed with a pistol and committed an overt act evidencing an intent to immediately use the pistol under such circumstances as were sufficient to create in the mind of a reasonable man, and did create in the mind of the officer, the belief that the offender was about to draw the pistol and immediately fire.—*Hammond v. State*, 79.

Same; Instructions; Self Defense.—Where there was evidence tending to show that defendant approached deceased under guise of making an arrest, but killed from vengeance or anger at deceased, instructions seeking to invoke the doctrine of freedom from fault which fail to hypothesize good faith on the part of the defendant in carrying a gun and in making the arrest, are bad and properly refused.—*Hammond v. State*, 79.

§ 2. Assault with Intent.

Homicide; Assault with Intent; Proof of Intent.—Intent, in assault with intent to murder, like in murder, need not be specifically proven, but may be inferred by the jury from the character of the assault, the weapon used, and other attendant circumstances.—*Ray v. State*, 5.

Same; Instructions.—A charge asserting that if accused shot B. with intent to kill him, and such shooting was done in a sudden encounter or affray, by the use of a deadly weapon concealed before the commencement of the fight, and B. had no deadly weapon drawn, and accused was the assailant, the jury should find him guilty is erroneous, as an intent to murder and not to kill is necessary, and it is immaterial whether accused' weapon was concealed or not, as section 4856, Code 1896, applies only to cases of homicide, and not to assaults to murder. (Overruling *Scroggins v. State*, 120 Ala. 369; 25 So. Rep. 180.)—*Ib.* 5.

Same; Harmless Error; Admission of Evidence.—In a prosecution for assault with intent to murder it is immaterial whether or not accused had on a coat and that witness could not see his weapon until it was drawn, yet such testimony was part of the res gestae, and its admission was harmless error.—*Ib.* 5.

§ 3. Evidence Generally.

Homicide; Evidence; Writ of Possession.—Where the evidence showed that the deceased and an officer were attempting to

HOMICIDE—Continued.

execute a writ of possession against defendant when the killing occurred, the writ was admissible, even in the absence of direct proof that the lands described in the writ were the lands on which defendant resided and from which he was sought to be ejected, there being evidence affording an inference as to that fact.—*Williams v. State*, 10.

Homicide; Evidence; Threats.—Where the killing occurred during an attempt to eject defendant from certain premises, it was permissible to show that a year before the killing defendant told witness he had decided not to give up the possession of the property, and if they came to put him out, he or they would die before they would get it.—*Ib.* 10.

Homicide; Evidence.—It having been shown that deceased was killed by a shot from a gun; that two shots were fired at the time of the killing, and that two empty shells bearing a certain mark were found near the place of the killing; that at the time of the arrest of defendant and his codefendant a number of shells were found on defendant, some bearing the certain mark, the shells found near the place of the killing were admissible in evidence as tending to show, in connection with the other evidence, that defendant fired them on the occasion of the killing.—*Fuller v. State*, 35.

Homicide; Evidence; Sufficiency. In a difficulty between defendant and deceased immediately before the killing, defendant secured deceased's pistol and shot him while he was retreating; Held, defendant was guilty of some degree of homicide.—*Outler v. State*, 39.

Homicide; Evidence.—From the time defendant appeared upon the scene of the killing, until the killing occurred, all the occurrences and conversations participated in by defendant were competent as evidence, which were shown to be parts of a continuous transaction, occurring within a brief space of time.—*Glass v. State*, 50.

Homicide; Malevolent Spirit; Common Purpose; Evidence.—Evidence that an hour or an hour and a half before the killing, while with another, defendant said that he was going over to a certain house near which the killing occurred and at which a dance was being had, and would dance or break it up, in connection with other evidence, was competent as showing a malevolent spirit on part of defendant, and as tending to show a common purpose on the part of defendant and a co-defendant to go to the house from an unlawful motive.—*Ib.* 50.

Same; Preparation for Act.—It was competent to show that half an hour before the homicide defendant borrowed a pistol as tending to show preparation.—*Ib.* 50.

Same.—It was competent to show that about the time of the difficulty a witness heard shots; that soon thereafter two men came running by from the direction of the scene of the homicide, that he heard one say "Wait F. J., I have killed one d—m scoundrel, and I will kill another if he runs up on me;" that the one who spoke had a pistol in his hand; and that defendant's codefendant, Bedsole, was commonly called F. J."—*Ib.* 50.

Homicide; Malice; Evidence.—For the purpose of showing a disposition on part of defendant to harm deceased, and also to show malice, it was competent to permit testimony that about a week before the homicide defendant said that if deceased did not quit following her around he was going to kill her.—*Parham v. State*, 57.

Same; Threats; Proof of Corpus Delicti.—If there is sufficient evidence of the corpus delicti to require a submission of that question to the determination of the jury, threats made by de-

HOMICIDE—Continued.

defendant against deceased become admissible.—*Ib.* 57.

Same; Evidence; Instructions at Inquest.—On a trial for murder instructions given the jury at the inquest are immaterial and not admissible.—*Ib.* 57.

Homicide; Evidence; Admissibility; Circumstances Preceding Act.—It is proper to limit defendant to proof of charges against deceased for violation of the ordinances, and not permit details of the act and conduct of deceased upon which the charges were based, when it appears that the defendant was marshal of the town, and the evidence tended to show that he was attempting or intending to arrest deceased on such charges at the time the killing occurred.—*Hammond v. State*, 79.

Same; Evidence; Admissibility; Threats; Bad Character.—It was error to exclude threats alleged to have been made by deceased against defendant, and to exclude evidence tending to show that deceased was a turbulent, dangerous and bloodthirsty character, where the defense was that the defendant, the town marshal, was in good faith, attempting to arrest deceased for a violation of the town ordinances, when the killing occurred.—*Ib.* 79.

HUSBAND AND WIFE.**§ 1. Rights in Property.**

Husband and Wife; Personal Property of Husband; Right of Disposition.—A wife, during the life of the husband, has no vested right in the personal property of the husband, and he may dispose of it by delivery as he sees fit.—*Robertson v. Robertson*, 311.

§ 2. Suretyship of Wife.

Husband and Wife; Suretyship of Wife; Burden of Proof.—The burden is on the wife to show that the debt, evidenced by a note and mortgage signed by both husband and wife, was that of the husband merely, and that she executed the same only as his surety.—*Gibson v. Wallace*, 322.

Husband and Wife; Agency of Husband.—The lender knew that the husband was the general agent of the wife; he declared that he would not make a loan to the husband, but that if he would get his wife to give a mortgage on her land, he would let the husband have the money. Held, should be construed to mean that the lender would let the husband have the money "for the wife."—*Ib.* 322.

Same; Evidence.—The evidence in this case examined and held to show that the wife was the principal debtor and not merely surety for the husband.—*Ib.* 322.

INCEST.

Incest; Indictment.—An indictment charging that, D. a man, being the father of C. D., a girl, and within the (prohibited) degree of consanguinity, etc., did have sexual intercourse with said C. D., was not subject to demurrer for failing to charge that C. D. was a woman: that is, a female at the age of puberty; charging, as it does, that she was a girl is sufficient.—*Dixon v. State*, 91.

Same; Elements.—The crime of incest may be committed, so far as the man is concerned, with a female not arrived at the age of puberty.—*Ib.* 91.

INDICTMENT. AND INFORMATION.

See Criminal Law.

For Particular Crimes, see Appropriate Titles.

Indictment and Information; Variance.—The indictment charged embezzlement of the funds of H. G. Kilgore. The evidence

INDICTMENT & INFORMATION—*Continued.*

showed that the funds belonged to Howell Greene Kilgore, that Kilgore signed checks and transacted business as H. G. K. and that his initials were H. G. K. Held, not to constitute a variance.—*Knight, J. v. State*, 104.

Same; Allegation and Proof.—The indictment charges, in the first count, the embezzlement of "fifty dollars, lawful money of the United States of America" and in the second count "Money to the amount of fifty dollars." There was no proof of the kind of money laid in the first count, and no allegation or proof that the property laid in the second count was of any value. Held, fatal to a judgment of conviction, and to entitle defendant to the affirmative charge.—*Ib.* 104.

Indictment; Designation of Person Owning Property.—A count of an indictment charging grand larceny, which lays the ownership of the property in the So. Ry. Co., but failed to allege that it was a corporation, partnership or person, is fatally defective.—*Burrow v. State*, 114.

Indictment; Fraud; Elements of Offense.—The purpose of Section 4762, Code of 1896, being the prevention of fraud, an indictment thereunder should allege that the sale was made or the exchange had with intent to defraud.—*Wester v. State*, 121.

Indictment and Information; Issues; Variance; Matters Unknown to Grand Jury.—While § 4901, Code 1896, dispenses with the necessity of laying the precise time, in the indictment, of the commission of an offense, where an indictment charges an offense to have been committed in a certain month, and proof is offered by the State of an offense committed at another time, defendant is entitled to show that, as to such offense, there was no evidence before the grand jury that returned the indictment.—*Lee v. State*, 133.

INJUNCTION.

§ 1. Preliminary.

Injunction; Preliminary Injunction; Dissolution; Denial of Equity.—Where the allegations of the bill, on which its equity depended, are fully, directly and completely denied in the answer, and no equity appears, by the case made, why the injunction should be retained, its dissolution should be decreed.—*Webster v. Debardeleben*, 280.

Injunction; Preliminary Injunction; Affidavits.—Affidavits are admissible in support of the allegations of a bill seeking injunction, in case of waste and where irreparable injury might ensue, if the injunction be not granted.—*Ib.* 280.

§ 2. For What Granted.

Injunction; Cutting Timber; Cross Bill; Sufficiency.—To the original bill seeking to construe the contract of lease and enjoin interference with its subject matter, respondents filed a cross bill, alleging that complainant in the original bill, had, under the lease contract for cutting timber of certain dimensions, removed timber from the lands without paying therefor, under the temporary injunction granted on original bill; that complainant had also cut and carried away the most valuable trees and left standing the less valuable ones; had so mixed the timber cut under the contract with timber cut from other lands, that it was impossible to separate same; that the value of the timber cut was more than \$1,000.00 and because of the violation of the terms of the contract respondents had elected to cancel same and had so notified complainant, who disregarded such notice, and continued to cut and remove the timber; that complainant was insolvent, and would con-

INJUNCTION.—*Continued.*

tinue the acts complained of, unless restrained, and respondents would suffer irreparable loss, for which they had no adequate remedy at law. Held, to state a case for equitable relief by injunction.—*Webster v. Debardelaben*, 280.

Injunction; Jurisdiction; Remedy at Law.—If the owner of land abutting on a highway is entitled to compensation for cutting trees on the land, his remedy at law is adequate, and he is not entitled to an injunction.—*Hobbs v. Long Dist. Tel. & Tel. Co.*, 393.

Injunction; Continuing Trespass.—It is proper to grant an injunction to restrain the continuous throwing of rocks upon complainant's resident and grounds by blasting, though the blasting be not negligently done, and though no personal injury has resulted, the trespass being a continuing one for which the law furnishes no adequate remedy.—*Central I. & C. Co. v. Vandenheuk*, 546.

§ 3. Dissolution.

Injunction; Dissolution; Grounds.—Considering the averments of the bill together with the denials and averments of the answer, it is held that the preliminary injunction should not be retained until final hearing on the theory that defendant was seeking to take complainant's property without just compensation.—*Mtg. L. & W. P. Co. v. Citizens L. H. & P. Co.*, 359.

Injunction; Motion to Dissolve New Matter; Effect.—On a motion to dissolve the injunction, new matter not responsive to the allegations of the bill cannot be considered.—*Town of N. Dacatur v. Schanfenberg*, 367.

Same; Terms of Dissolution.—It was proper to have dissolved the injunction on the city's making a cash deposit and executing a bond to cover probable damages to be ascertained on a reference, in a suit by the owner of abutting property for an injunction to restrain a change of the grade without having made compensation therefor.—*Ib.* 367.

Injunction; Temporary Injunction; Motion to Dissolve; Evidence.—Ex parte affidavits and copy of deed in support of complainant's title to the land, on the hearing of a motion to dissolve the temporary injunction on the coming in of the answer, although the sworn answer denies title of complainant to the land, may not be used to support complainant's title.—*Roman v. Long Dis. Tel. & Tel. Co.*, 389.

Same; Notice.—Where extrinsic evidence is proposed to be used to support the allegations of the bill, or the denials of the answer, on the hearing of a motion to dissolve an injunction, the offer to do so must be seasonably made and timely notice thereof given.—*Ib.* 389.

INSANE PERSONS.

Insane Persons; Guardian; Instructions from Court.—Where the guardian of an insane person executed a mortgage on the property of the insane person under a decree of the chancery court, such guardian had the right to apply to such court for instructions and authority necessary to execute the trust, as other trustees.—*Montgomery v. Perryman & Co.*, 207.

Same; Sale of Property of Ward; Confirmation.—The title of the property of the ward being not in the guardian, but in the ward, when sold under a decree of the court, the court becomes the vendor, and until confirmed by the court the sale is incomplete and confers no rights on the purchaser.—*Ib.* 207.

Same; Mortgage of Ward's Property; Confirmation by Court.—Where a decree was entered by the court authorizing the

INSANE PERSONS.—*Continued.*

mortgaging of the ward's property but the property to be mortgaged was not designated by the decree, but left to the selection of the guardian, such mortgage is void, unless the making thereof is reported to and confirmed by the court.—*Id.* 207.

INSURANCE.

§ 1. Dissolution; Assets.

Insurance; Dissolution of Company; Assets.—Under a resolution passed by the directors of a fire insurance company, among whom were complainant minority stockholders, certain stockholders of the company gave demand notes equalling in amount their stock in the corporation; the resolution provided that upon a dissolution of the corporation or upon the winding up of its affairs, such of the stockholders as did not make contribution in the shape of such notes, should not be entitled to participate in any fund to be derived therefrom. Such contributions were intended for the benefit only of the creditors of the company. The corporation was dissolved, and all of its debts and demands paid. Held, that though the notes were supported by a consideration, in that they were given to raise the capital stock of the company to a sum where it could continue business without forfeiting its charter, the non-contributing stockholders were not authorized to seek a collection of the notes and participate in the distribution of the proceeds of the same.—*Anderson v. Buckley*, 415.

§ 2. Policy.

Insurance; Variance in Policy; Premiums.—It is no defense to a note given for premium on an insurance risk that the form of the policy issued was different from that contracted for, it appearing that the policy was retained and no effort made within a reasonable time to ascertain that it was different and to return it for cancellation.—*Hutchinson v. Palmer, et al.*, 517.

INTOXICATING LIQUORS.

Intoxicating Liquors; Licenses; Issuance to Firm; Rights of Partner.—The defendant having purchased his partner's interest in the firm, was authorized to carry on the same business under the license granted to him and his partner to retail liquors.—*Lynch v. State*, 143.

JUDGES.

§ 1. Powers.

(a) Appointment of Receivers in Vacation.

Judges; Proceedings in Vacation; Appointment of Receivers.—Under acts 1894-95, p. 881, the judges of the circuit court of Jefferson county have power and authority to appoint receivers in vacation.—*Ensley Dev. Co. v. Powell*, 300.

JUDGMENTS.

§ 1. Conclusiveness.

Judgments; Conclusiveness; Res Adjudicata.—After judgment against the corporation and execution returned unsatisfied, plaintiff sued out writs of garnishment against certain stockholders for unpaid subscription, as authorized by § 2182, code 1896. The stockholders answered denying indebtedness, and, no contest being filed, garnishees were discharged, which judgment was reserved on appeal, after which one of the stockholders was discharged with plaintiff's consent, and two others were fully examined touching their liability. One of these was

JUDGMENTS—Continued.

discharged and the judgment affirmed on appeal, and plaintiff took nonsuit as to the other; Held, that as to all the garnishees, except the one against whom the non suit was entered, the judgment of discharge was res adjudicata as to plaintiff's right to enforce their alleged liability by bill in equity under § 823, Code 1896.—*Montgomery Iron Works v. Roman*, 434.

Judgments; Res Adjudicata.—Plaintiff, in a former action, sued defendant upon certain notes given for a stock of goods, and for the interest due on others given for the same purpose. The defendant pleaded failure of consideration. Plaintiff had judgment for less than the amount of the notes sued on, and the interest on the other notes. Held, such judgment did not operate either as a bar to the plaintiff's right to sue on the other notes, or to the defendant's right to set up failure of consideration as to the other notes.—*Penny v. Corey*, 617.

Judgments; Parties Concluded; Parties to the Action.—Evidence of proceedings in another cause to which one of the defendants in the pending action was not a party, are not admissible in evidence in behalf of all the defendants to the pending action, for the purpose of showing that a certain issue was res adjudicata. Such proceedings would be proper if limited in their effect to the defendants in the proceedings.—*Ryan, et al. v. Young*, 660.

§ 2. Confession of.

Judgment; Confession of.—When one signs a note in which is embodied a power of attorney authorizing a confession of judgment on failure to pay note at maturity, this is a waiver of notice, and a judgment rendered in accordance with the authority thus given is as valid and binding as if rendered on regular service of process.—*Hutchinson v. Palmer, et al.*, 517.

§ 3. Equitable Relief.

Judgment; Equitable Relief; Parties Entitled.—Equity will relieve the heirs of a judgment against the administrator, where such judgment was obtained through collusion with the administrator, or on account of a failure on his part to use due diligence to defend the action, unless the judgment was for a valid and subsisting claim.—*Patterson v. Carter*, 522.

Judgment; Equitable Relief; Meritorious Defense.—In order to obtain equitable relief against a decree on the grounds of fraud, the complainant must show that he had a meritorious defense which can be established by evidence upon another trial, that the judgment was taken by fraud of respondent, and that complainant was not negligent.—*Collier v. Parish*, 526.

Same; Evidence; Sufficiency.—The evidence considered in this case and held insufficient to show fraud, or the absence of negligence on part of complainant.—*Id.* 526.

JUDICIAL SALES.

Judicial Sales; Vacation; Collateral Attack; Diligence.—Unless the party seeking relief acquit himself of want of diligence in resisting the confirmation of the sale, where property had been sold under a chancery decree, and the same has been confirmed, it will not be set aside in a collateral proceeding.—*Harris, et al. v. Stephenson*, 537.

JURY.

See Criminal Law.

§ 1. Grand Jury; Drawing and Summoning.

Grand Jury; Drawing and Summoning; Written Order of Court; Necessity; Record; Sufficiency.—Under § 10 of the Act amend-

JURY—Continued.

ing the Jefferson Criminal Court Act (Acts 1900-01 p. 217.) it is not essential that the opinion of the judge of the necessity for the organization of the grand jury be in writing; and where the record recites that the grand jurors were drawn according to law, and that the court did formally organize the grand jury at the beginning of the term from the grand jury venire returned by the sheriff, it is sufficiently shown that the opinion of the judge had been duly expressed and communicated to the proper officers, and that the jurors were duly drawn and summoned.—*Dix v. State*, 70.

§ 2. Petit Jurors; Excusing.

Jury; Service; Excuse.—The court has authority in a criminal case to excuse a juror on account of his wife's condition demanding his personal attention.—*Williams v. State*, 10.

(b) List, Preparation.

Jury; List; Preparation.—A special or other jury venire drawn from a box that contained the names of the resident citizens of only a portion of the county is fatally defective under Section 4982, Code 1906.—*Hanners v. State*, 27.

(c) Motion to Quash.

Same; Mistake in Name; Motion to Quash.—A mistake in the name of any person drawn as a juror for the trial of a capital case, either in the venire or the copy served on defendant, is not sufficient grounds upon which to quash the venire, or delay the trial, under the express provision of § 5007, Code 1896. The court must discard such names and direct that others be forthwith summoned.—*Hammond v. State*, 79.

(d) Drawing and Selecting.

Same; Selection of Jurors.—Where it affirmatively appears that the list of jurors made by the clerk was composed of the names drawn by the judge and placed in an envelope; that the names were an exact copy of the names on the list so made out, and that a copy of the names were served on the defendant one entire day before his trial, it was not prejudicial to the defendant that the clerk did not make out a list of the names immediately after they were drawn, but kept them in an envelope and made out the list some four hours later; and, if not strictly in accordance with § 5004, any error was cured by § 4333, Code 1896.—*Hamner v. State*, 79.

Jury; Special Venire; Drawing Jury.—It is not essential, under § 5004, Code 1896, that the presiding judge call out the names of the jurors as he draws them from the jury box.—*Ib.* 79.

JUSTICES OF PEACE.

§ 1. Jurisdiction.

Justices of Peace; Jurisdiction; Enforcement of Mechanic's Lien.—The jurisdiction to entertain a suit for the enforcement of a mechanic's lien by a Justice of the Peace is purely statutory.—*Tolbert v. Falkenberry*, 204.

Same; Statutes; Construction.—Section 2733 of Code of 1896 does not confer jurisdiction on Justices of the Peace to render judgment enforcing a mechanic's lien, where the amount of same exceeds fifty dollars, and a judgment rendered by a Justice of the Peace to enforce such a lien, where the amount involved exceeds fifty dollars, is a nullity.—*Ib.* 204.

JUSTICE OF THE PEACE—*Continued.*

§ 2. Qualification.

Justices of the Peace; Qualification; Void Acts.—A justice of the peace whose term of office expired in August 1904, and who failed to give an official bond as required by General Acts 1903, p. 238, thus extending his term until the next general election, vacated the office, and an attachment issued by him after Sept. 10, 1904, was void.—*Smith v. Hilton*, 642.

LANDLORD AND TENANT.

Landlord and Tenant; Cropping Contract; Tenancy in Common.

—Where one party furnishes the land and team with which to cultivate it and the other party furnishes the labor necessary to make the crop, and each party furnishes an equal amount or one half the fertilizers used to make it, with agreement to divide the crop equally, a tenancy in common in the crop exists under § 2760, Code 1896.—*Hendricks v. Clemmons*, 590.

Landlord and Tenant; Action for Rent; Instructions.—Where the sublessee set up as a defense to an action for the rent that he ought to have compensation for the interruption of his business by tearing down and rebuilding a wall, a charge asserting that if plaintiff paid the principal lessee a sum for the privilege of remaking the wall, this was evidence of damage to the party in possession, was erroneous.—*McConnell v. Adair*, 599.

LARCENY.

Larceny; Indictment; Description of Property.—An indictment, the first count of which alleges the taking of two twenty dollar bank bills, and one dollar bank bill, lawful money of the United States of America; and the second count of which alleges the taking of two twenty dollar national bank notes and one one dollar national bank note, lawful money of the "U. S. A.", and the third count of which describes the property taken as two twenty dollar United States treasury notes, and one one dollar United States treasury notes, lawful money of the "U. S. A.", is not demurrable for failing to sufficiently describe the property alleged to have been taken.—*Hamilton v. State*, 110.

Larceny; Trial; Instructions.—Instructions hypothesizing the description of the property as alleged in a count of the indictment, and requiring that the defendant could not be convicted unless the proof showed that the money stolen was this certain kind of money, were improperly refused.—*Ib.* 110.

LICENSE TAX.

License Tax; Municipal Authority to Enforce.—It is the settled law in this State that the legislature can confer upon cities and towns the power to impose a license tax upon business.—*Gamble v. City of Montgomery*, 682.

Same; When not Unconstitutional.—If the tax is not unreasonable, and does not in its operation discriminate against one and in favor of another member of the same class, it is not violative of either the State or Federal Constitution.—*Ib.* 682.

City Ordinance; Presumption of Reasonableness.—When the question of the reasonableness of a city ordinance is raised, and it has reference to a subject matter within the corporate jurisdiction of the city, it will be presumed to be reasonable, unless the contrary appear upon the face of the law itself, or is established by proper evidence.—*Ib.* 682.

Taxation; Uniformity of; When Rule not Violated.—A city ordinance, imposing upon persons engaged in the business of

LICENSE TAXES—Continued.

furnishing trading stamps to merchants to be distributed among their customers for use in the purchase of other merchandise, a larger tax than that imposed upon merchants carrying on an ordinary mercantile business, is not violative of the constitutional provision requiring uniformity of taxation.—*Ib.* 682.

LIFE ESTATE.

Life Estates; Acts of Life Tenant; Injury to Remainder; Waste.

—The life tenant cannot commit waste or authorize its commission, nor can she, by conveyance, impair the remainder.—*C. W. Zimmerman Mfg. Co. v. Wilson*, 275.

MANDAMUS.

Mandamus; Scope of Remedy; Adequate Remedy at Law.—Mandamus will not lie to enforce a legal right, unless the right is clear and there is no adequate remedy.—*Kelly, et al. v. Horsely*, 508.

MORTGAGES.

See Chattel Mortgages.

§ 1. Foreclosure.

Mortgages; Foreclosure; Evidence; Sufficiency.—The evidence in this case stated and examined, and held sufficient to support a finding that the mortgage had not been fully paid, authorizing foreclosure.—*Ladd v. Lookout Mt. Dis. Co.*, 173.

Mortgages; Foreclosure; Sale; Vacation.—At the time of the sale of a large tract of land, it was agreed in writing if the vendor had no sufficient title to a part of the land, the price should be abated as to this land, which should be credited on the mortgage given to secure the purchase price. The defendant, to whom the mortgage was assigned, had full knowledge of such agreement before the assignment of the mortgage to him. There was a failure of title as to 102 acres of the land. Held, complainant was entitled to vacate a sale of the land under the mortgage, when the sale was made at the time when there was nothing due on the mortgage, if the complainant had been credited with the value of the land to which the title had failed.—*Yarbrough v. Thornton*, 221.

Mortgages; Right to Foreclosure; Tender of Amount Due.—A sale under a mortgage is invalid where the amount due thereon was tendered before any steps were taken to make sale under the power.—*Wittmeir v. Tidwell*, 354.

Same; Attorney's Fees.—In order to terminate a mortgagee's right to foreclose a mortgage by sale under the power, where the mortgage provided for the payment by the mortgagor of all attorney's fees legally incurred in collecting the indebtedness or in foreclosing the mortgage, a tender of the attorney's fees legally incurred before the tender is necessary.—*Ib.* 354.

Same; Pleadings.—A bill averring a tender of attorney's fees to attorney of respondent, but not alleging that the tender was made before steps were taken to foreclose the mortgage, such averments was insufficient to show a valid tender.—*Ib.* 354.

Same; Offer to do Equity; Payment into Court.—Where the complainant offers to pay whatever is found to be due under the mortgage, that is a sufficient offer to do equity, without a payment of the money into court.—*Ib.* 354.

Same; Parties.—When the bill avers that the mortgagee has transferred or assigned the mortgage, but that the assignment did not divest him of the legal title to the property conveyed by the mortgage, such mortgagee is a proper, if not necessary,

MORTGAGES—Continued.

party respondent to the bill seeking to restrain the foreclosure.—*Ib.* 354.

Mortgages; Action for Foreclosure; Reference; Notice to Defendant.—It is unnecessary to give notice of a reference to be held in a suit for the foreclosure of a mortgage to a defendant who is in default.—*Winkelman v. White*, 481.

Mortgages; Actions for Foreclosure; Necessity for Cross Bill.—In a foreclosure suit, filed by the holder of two of several notes secured by a mortgage, affirmative relief may be granted to the holders of all the other notes, and the priority of liens declared, without a cross bill filed by the holders of the other note.—*Ib.* 481.

§2. Description of Property.

Mortgages; Lands Conveyed; Description.—A mortgage which described the land as "the mineral land described in" a certain deed, will be construed to mean the land described in the deed which were in fact mineral lands, the deed not particularly describing any certain lands as mineral lands.—*Smith v. Vary*, 36.

§3. Deed as Mortgage.

Mortgages; Absolute Deed as Mortgage; Jurisdiction of Equity.—If one gives a deed to land and takes an agreement to have a reconveyance of the land on the payment of a sum certain, and pending payment, which is made when due, the grantee collects rents on the land, the grantor is entitled in equity to enforce a repayment of the rents against the grantee, having no adequate remedy at law.—*Thomas v. Livingston*, 200.

§4. Equitable Mortgages.

Mortgage; Equitable Liens; Sale Under Executions; Priorities.—An unmarried man executed to his creditor an instrument, in form a mortgage, unacknowledged and unattested, to secure a recited indebtedness; the instrument contained apt words of conveyance and was recorded. Held, such an instrument was an equitable mortgage enforceable in a court of equity against subsequent purchasers of the mortgagor, with notice of the equity.—*Markham v. Wallace*, 243.

Mortgages; Equitable Mortgages; Absolute Conveyances.—A bill to declare an express trust in lands conveyed by deed absolute which avers that no consideration was paid but deed was made for purpose of investing legal title in grantee, as trustee for complainant's mother, and that subsequently grantee advanced to one of the grantors various sums of money and looked to the property as security for repayment of the sums advanced, but which fails to aver in terms that any indebtedness existed between the grantor and grantee at the date of the execution of the deed, or any agreement for future advances were made to one of the grantors and the lands conveyed looked to as security for the payment of same, or that such grantor received the advances with any agreement that grantee could look to the land for payment or security does not allege sufficiently an agreement for a lien, or show a debt on which to rest the theory of an equitable mortgage; especially when the evidence shows that at the time of the execution of the deed, the legal title to the land was vested in one of the grantors as trustee, for the wife of another of the grantors.—*Jacoby v. Funkhouser*, 254.

Same; Conveyance to Secure Debt; Pleading; Sufficiency.—An allegation that the grantee, after the execution of a deed abso-

MORTGAGES—Continued.

lute, made advances to one of the grantors and looked to the land conveyed as security for advances so made, is not the equivalent of an averment that such deed was given to secure the debt.—*Ib.* 254.

Same; Pleadings; Proof.—Proof of facts not alleged in the bill are immaterial, as proof without averment is unavailing to obtain relief in equity.—*Ib.* 254.

§ 5. Redemption from Foreclosure.

Mortgages; Foreclosure; Redemption; Bill.—The bill avers that the mortgage which was foreclosed was given to secure an indebtedness of \$174.25, on which there was a credit; a sale under foreclosure and purchase of lands for \$200; a tender to the proper parties of \$249.00 for the purpose of redemption. Held, not subject to dismissal for failure to allege a tender of the purchase money, 10 per cent, etc.—*Fuller v. Varnum*, 336.

Same; Possession.—The bill alleges that the lands mortgaged was the homestead of complainant's father, who died in possession thereof the same year of the foreclosure; that it was all the land owned by the parent, and did not exceed 160 acres in area, or \$2,000 in value, and that the parent owned less than \$1,000 worth of personal property; that the parent left a widow and seven minor children, of whom complainant was one, Held, the bill was not subject to motion to dismiss for failure to allege who was in possession of the land at the time of foreclosure, or of the filing of the bill.—*Ib.* 336.

Same; Surrender of Possession.—Until demand has been made by the purchaser, or his vendee, for possession of the land sold under the mortgage no duty rests upon one in possession to surrender, as a condition precedent to such a one's right to redeem.—*Ib.* 336.

MUNICIPAL CORPORATIONS.

See License Tax.

§ 1. Changing Grade of Street.

Municipal Corporations; Change of Grade of Street; Damages; Remedies of Property Owners.—The property owner is entitled to injunctive relief, irrespective of the city's solvency or of the fact that he might obtain full compensation at law, where the municipality undertakes to change the grade of a street to the injury of the property abutting thereon, without first having compensated the owner.—*Town of New Decatur v. Scharfenberg*, 367.

Same; Damages; Waiver.—The fact that the owner of property abutting on a street petitioned the municipality for the paving of the same is not a waiver of damages resulting from a change of grade in constructing the pavement.—*Ib.* 367.

Same; Remedies of Property Owner.—The city having commenced to change the grade of a street without compensating the owner of the property abutting thereon for injury thereto, the property owner may, by bill for injunction, have the street restored to its former condition.—*Ib.* 367.

Municipal Corporations; Changing Grade of Street; Damages; Waiver.—If the owner of property abutting on a street has been informed of a proposed change of grade and thereupon requested the official in charge of the work to proceed with it, and the city, acting upon such request, incurred expenses in preparing for the change of grade, and commenced the work, the owner was not entitled to an injunction, although no compensation has been paid him.—*Ib.* 367.

MUNICIPAL CORPORATIONS—*Continued.*

Same; Nature of Liability; Remedies of Owners.—The fact that there has been no negligence in or about the way in which the work was done in making the change, does not deprive the owner of abutting property of the right to have the street restored to its former condition, where the city undertakes to change the grade without making compensation to the owner for injury done the property.—*Ib.* 367.

§ 2. Ultra Vires Acts.

Municipal Corporations; Ultra Vires Acts; Injunction; Parties.—An alderman of a town may, in his individual capacity, as a tax payer of the town, join with other tax payers as complainants to enjoin the ultra vires acts of the municipal corporation and its officers.—*Gillespie v. Gibbs*, 449.

Same; Parties Defendant.—The officers of a municipal corporation engaged in the doing of ultra vires acts on behalf of the corporation are proper parties defendant to a bill to enjoin such acts, and the municipal corporation is a necessary party defendant.—*Ib.* 449.

Same; Defenses.—The fact that after suit filed the corporation and its officers discovered their error and rescinded the order under which the acts were directed to be done and abandoned the illegal scheme, does not afford cause for dismissing a suit properly filed to enjoin such threatened ultra vires act, even though by amendment to the bill such matters are set up as having occurred.—*Ib.* 449.

Same; Bill; Amendment.—Where the town abandoned its project of purchasing an additional lot for school purposes and stopped paying out corporate funds to repair the school house, after bill had been filed to enjoin such acts, but the municipal authorities immediately rented for the town hall a portion of the same school house for a period of five years and paid the rent for the whole term in advance, which was a mere subterfuge to avoid the injunction, an amendment setting up these facts did not destroy the equity of the bill.—*Ib.* 449.

§ 3. Powers.

Street Improvement and Assessment.

Municipal Corporations; Street Improvement; Special Assessment; Method of Imposition.—The determination of the proportion of the burden of the cost of street improvement, that shall be borne by the abutting property and by the public, being a matter of legislative discretion, and the legislature having determined that the assessment shall be made in a particular manner, it will be presumed that the legislature has determined, that that is the proper measure of the benefits received.—*Harton v. Avondale*, 458.

Same; Assessment of Benefit.—The rule of assessment that the cost of the improvement must be assessed in proportion to the amount of benefits accruing to the property owner means simply that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners, and not that one owner should not be charged in excess of actual benefits received.—*Ib.* 458.

Same; Charter Provisions; Validity.—The charter of the city of Avondale (Acts 1894-5, p. 139) does not violate § 223, constitution of 1901.—*Ib.* 458.

Same; Review.—Under the provisions of the charter of Avondale the property owner against whom the assessment is made, if not satisfied with the action of the board of assessment, (in this

MUNICIPAL CORPORATIONS—Continued.

case the city council) may remove the matter by certiorari to the city or circuit court, and have the matter tried *de novo*.—*Ib.* 458.

Same; Apportionment of Cost.—Section 12 of the Avondale city charter declares that not more than one-third of the cost of street improvements shall be assessed against the owners of abutting property, not including sidewalks. Held, the city was without authority to assess one-third of the cost of the entire street improvement to the owners on each side of the street, as such assessment would require a payment by the abutting property of two-thirds of the cost of the work.—*Ib.* 458.

Same; Cost of Guttering.—Section 12 of the Avondale city charter does not authorize the assessment of the entire cost of guttering against the property abutting on the street.—*Ib.* 458.

Same; Authority to Improve Streets; Character; Delegation.—The authority granted the city of Avondale and its council to grade and pave streets and sidewalks is legislative in character, and it cannot delegate to any other official or committee to determine the kind and character of the improvements. The city council must ascertain and determine this matter.—*Ib.* 458.

Same; Ratification.—Where the ordinance providing for the improvement of a street, delegated to the street committee the duty of having the streets graded, guttered, curbed and macadamized, and left the specifications and material to the judgment of the street committee, and after levy of an assessment the work was accepted by the city council, such acceptance constituted the entire proceedings the act of the city council, and the assessment was not void because the specifications and material were left in the first instance to the street committee.—*Ib.* 458.

Same; Method of Levy; Assessment.—Section 223, constitution of 1901, places but one limit on street improvement assessment, and an assessment is not void under it, solely because each lot was assessed on the basis of the cost of the work done in front of it, instead of first ascertaining the entire improvement cost, and apportioning the same among the abutting owners.—*Ib.* 458.

OFFICERS.

See Corporations.

Officers; Contracts; Personal Liability.—Acting under the supposed authority conferred upon them by an act establishing a liquor dispensary at Ashford, Ala., (Local Acts 1900-1, p. 800) the board of dispensary commissioners purchased liquors for sale in the dispensary; the commissioners made no promise to pay for the liquors, and derived no personal benefit from their purchase; made no representations to the seller not contained in the provision of the act, which was as well known to the seller as to them; upon the act being declared unconstitutional no personal liability attached to the members of the board.—*Schloss-Kahn v. McIntyre, et al.*, 557.

OVERRULED CASES AND CASES QUALIFIED.

Scroggins v. The State, 120 Ala. 369, by *Ray v. The State*, 5.

Armstrong v. Connor, 86 Ala. 350, by *Patterson v. Simpson*, 550.

Landsden v. Bone, 90 Ala. 446, by *Patterson v. Simpson*, 550.

PARTNERSHIP.

Partnership; Contract; Sharing Profits.—Where one rented a quarry, furnished all the capital to run the business, and assigned

PARTNERSHIP—*Continued.*

no part of his lease to another, who agreed to manage the quarry and commissary and give the business his time and attention, and to receive half of the net proceeds of the profits of the quarry and commissary and one half the rental of the houses, instead of a stipulated salary, constituted an agreement for services to be paid for from profits, and was not a contract of partnership.—*Zuber v. Roberts*, 512.

PARTIES.

§ 1. Striking out.

Parties; Striking Out.—Where the party to the contract and its agent in the purchase of the wood were jointly sued for a breach of the contract, and the evidence failed to disclose any individual liability on the part of the agent, it was proper to permit an amendment striking out the agent's name as party defendant.—*Eagle Iron Co. v. Baugh*, 613.

PART PAYMENT.

See Accord and Satisfaction.

PARTY WALL.

Party Walls; Construction of Contract.—Where adjoining owners contracted that in consideration of the building of a wall by one partly upon both lots, the other, when he built upon his lot, would pay to the one, one half the cost of the wall, such other, when he built upon his lot was liable to the one for half the cost of the wall, whether he joined to it or not.—*Jebbles & Colias Conf. Co. v. Brown*, 593.

Same; Covenants Running With the Land.—Under a contract to pay one half the cost of the wall to be built by one of adjoining lot owners, in which it is expressly provided that the covenant to make such payment shall run with the land and be binding on the present and future owners of the land, such covenant does run with the land and binds successive owners.—*Ib.* 593.

PLEADING.

See Appeal and Error, § 1.

See Criminal Law.

See Chattel Mortgages.

See Equity.

See Fraud.

In Various Actions, see Appropriate Titles.

PLEADINGS.

§ 1. Departure.

Pleadings; Bill; Amendment; Departure from Original Cause.—

Where a bill was filed to enforce a vendor's lien, describing the land by half and quarter sections, and a copy of the deed was attached and made a part of the bill, describing the lands as described in the bill, it was not a departure from the original bill to permit an amendment which sought to explain and make clear just how much and what lands were sought to be conveyed by the deed.—*Reynolds, et al. v. Lawrence*, 216.

§ 2. Amendments.

Amendment; Partnership; Suit Against Firm; Bill; Parties Defendant.—The bill was exhibited against a partnership composed of three named persons, non-residents, service was had on one of the named partners; complainant offered to amend by converting the suit into one against the partners individually,

PLEADINGS—Continued.

and to strike the names of those not served. Held, the amendment should have been allowed, even conceding that Section 40, Code 1896, has no application to suits in equity.—*Levystein v. Gerson, et al.*, 251.

§ 3. Demurrer.

Pleadings; Demurrer; General Demurrer.—Under Code 1896, Section 3303, none but special demurrers, as to matter of substance, are permitted, but in the case at bar, demurrers which are grounded upon the statement that the allegations of the bill show no sufficient rights in the complainant to exercise such right of redemption as claimed in the bill, and, that the allegations of the bill do not sufficiently show that the complainant is entitled to exercise such right of redemption in the manner and form as alleged, although general in form, are sufficient, and clearly point out that complainant occupies neither relation mentioned in the statute.—*Wallace v. Markstein*, 262.

Pleading; Demurrer to Complaint.—It is proper to overrule a demurrer addressed to a part of a count; a demurrer must go to the whole count to be available.—*McCleskey & Whitman v. Howell Cotton Co.*, 573.

§ 4. Pleas in Abatement.

Pleading; Pleas in Abatement; Time for Filing.—A suit was filed against a corporation and an individual, in the county in which the individual lived, and in which the corporation had no place of business. During the course of the trial plaintiff amended by striking out the individual sued as party defendant and the corporation offered to file a plea in abatement. Held, construing §§ 3271, 4205, and 4207. Code 1896, and Rule of Circuit Court Practice, No. 12, together, that the defendant corporation was entitled to file its plea in abatement to the jurisdiction of the court.—*Eagle Iron Co. v. Baugh*, 613.

§ 5. Conclusions.

Pleadings; Conclusions.—Where the allegation was that the mortgagor tendered the mortgagee the money and cotton called for by the mortgage, but without specifying the amount of either, such averment was insufficient, as it was a mere conclusion of the pleader.—*Wittmeier v. Tidwell*, 354.

Pleadings; Conclusions.—The grounds of relief averred in the bill, and on which an injunction is sought to restrain one light company from stringing wires upon a pole belonging to the other light company, are that there has already been strung on said pole all the wires it would bear with safety to its service and security to the people, and that notwithstanding this fact and the further fact that the city ordinances forbade defendant from interfering with poles and wires of complainant, defendant is attempting to string and is stringing its wires on the pole, and unless interfered with would so string its wires as to result in irreparable damage to complainant, and render the pole absolutely dangerous to the lives of people walking on the street; and in addition make it impossible for complainant to attend to securing its own wires on the pole, endanger the lives of its employees, who are frequently compelled to climb the pole to repair complainant's wires, and prevent it from furnishing current for lights to the people. Neither the size or capacity of the pole, the number of wires strung thereon, the proximity of the wires to each other, nor their location is alleged. Held, mere conclusions and subject to demurrer.—*Mtg. L. & W. P. Co. v. Citizens L. H. & P. Co.*, 359.

PLEADINGS—Continued.

§ 6. General Denials.

Pleadings; General Denial.—It not appearing prima facie that certain allegations made in the bill were within the knowledge of respondents, a general denial of such allegations was sufficient to put in issue the allegations and require proof in support thereof.—*City of Mobile v. Fowler*, 403.

§ 7. Failure of Consideration.

Action upon Note; Sufficiency of Plea Setting up Fraudulent Misrepresentation and Failure of Consideration.—In an action upon a promissory note, where the defendant, by special plea, avers that the note was given for the purchase price of certain whiskey sold by plaintiff to the defendant, who was in the retail liquor business; that said sale was made through plaintiff's agent who represented to the defendant that he knew what kind of whiskey the defendant's trade would purchase; that the whiskey he proposed to sell to him would meet the demands of the defendant's trade; that the defendant did not know the character of the whiskey proposed to be sold, but relying entirely upon the representation of plaintiff's agent, purchased the whiskey and gave the note sued on, and that said representations of plaintiff's agent were false; that the whiskey which was delivered under said purchase did not meet the wants of defendant's trade, as stated by said agent; that the defendant was unable to sell the same, and that therefore the consideration for which the note was given had failed,—such plea is insufficient as setting up fraudulent misrepresentation, or as presenting the defense of a failure of consideration.—*Shiretzki v. Kessler & Co.*, 678.

Same; Sufficiency of Replication to Plea Setting up Void Contract.—In an action upon a promissory note, where the defendant by special plea, sets up the defense that the note sued on was an Alabama contract, and was given for the purchase of whiskey, and that the same was void, for the reason the plaintiff had not paid for and obtained a license as required by law, a replication to such plea which alleges in substance that the whiskey when sold by plaintiff's agent, was not in the State of Alabama, but was in the State of Kentucky, and was to be delivered to the defendant in that state some time in the future, is a sufficient reply to said plea, and shows that said transaction was not in violation of the statute which provides that all sales of liquor are void if the seller has not taken out a license (Code § 3524.)—*Ib.* 678.

PLATTING AND SURVEY.

Effect of Failure to Record.

Vendor and Purchaser; Effect of Vendor's Wrong; Bona Fide Purchasers.—The fact that the owner of land plots and sells the same without having the survey of the plot recorded, as required by acts 1886-87, p. 93, does not affect the title of an innocent purchaser of one of the lots.—*Thomas v. Cowin*, 478.

PRINCIPAL AND AGENT.

§ 1. Powers of Agent.

Principal and Agent; Powers of Agent; Burden of Proof.—Where a stockholder, in a building and loan association, claims that the soliciting agent of the association had guaranteed the maturity of his stock in 72 months, the burden was on the complainant to show the agency of the one making the guarantee, and that it was within the scope of his authority.—*Ebersole v. So. B'd & L. Assn.*, 177.

PRINCIPAL AND AGENT—*Continued.*

Principal and Agent; Power of Agent; Evidence as to Authority; Declaration of Agent.—Whether or not the salesman said to the buyer that he was merely taking a bid from him, which would have to go to the house for acceptance or rejection, was incompetent as against the principal.—*Gould v. Cates Chair Co.*, 629.

§ 2. Relation.

Principal and Agent; Offer and Acceptance.—Appellants requested appellee's agent and buyer to communicate to appellees an offer of certain cotton at a specified price; Held, this constituted appellee's buyer appellant's agent to make the offer and receive acceptance, so that an acceptance of the offer made known to the agent was binding on the appellants without their having actual notice thereof.—*McCleskey & Whitman v. Howell Cotton Co.*, 573.

Principal and Agent; Existence of Relation.—Evidence of the statements or admission of an agent are not admissible against the principal for the purpose of establishing the authority of the agent, nor can such authority be established by showing that he acted as agent or claimed to have the powers he assumed, when his authority is questioned; such statements and admissions become competent only after some other evidence has been introduced tending to show such authority, or when such other evidence has been subsequently introduced.—*Eagle Iron Co. v. Baugh*, 613.

Principal and Agent; Existence of Relation; Evidence; Declarations of Agent.—The existence of the relation of principal and agent is not shown by the mere declaration of the agent.—*Smiley v. Hooper*, 646.

QUIETING TITLE.

Quieting Title; Statutory Action; Possession.—A bill to quiet title is not maintainable when the evidence discloses possessory acts on the land by defendant, the statute requiring peaceable possession in plaintiff as a condition precedent.—*Johnson v. Johnson*, 543.

Quieting Title; Married Woman's Deed; Remedy at Law.—A deed executed by a married woman to secure the husband's debt being absolutely void, under § 2529, Code 1896, she cannot, while out of possession, maintain a bill to remove the deed as a cloud on her title, her remedy at law being complete and adequate.—(*Armstrong v. Connor*, 86 Ala. 350, and *Landsen v. Bone*, 90 Ala. 446, explained.—*Patterson v. Simpson*, 550.

RECEIVERS.

§ 1. Appointment and Notice.

Receivers; Appointment; Notice.—A receiver should not be appointed in *ex parte* proceedings upon the application of stock holders to dissolve a corporation, under the provisions of Acts 1903, p. 337, until after personal notice to resident, and published notice to non-resident, stockholders, and not then without proof as required; unless in case of great emergency otherwise allowed by law.—*Ensley Dev. Co. v. Powell*, 300.

Same; Notice to Corporation; Sufficiency.—Upon application for a receiver, a letter from the V. president of the corporation to an attorney stating that the appointment of a person, therein named, as receiver, would be satisfactory to him, especially when it is not shown whether the letter was written before or after the appointment of the receiver, and the letter was not signed by the officer in his representative

RECEIVERS—*Continued.*

capacity, such letter is not a waiver of notice by the corporation, nor does it show notice to the corporation.—*Ib.* 300.

Receivers; Appointment; Sequestration.—The power to appoint a receiver and sequester property should be exercised with caution, and only where it appears that plaintiff will sustain irreparable loss without it.—*Hays v. Jasper Land Co.*, 340.

Same; Appointment Before Decree on Merits.—To justify the appointment of a receiver *in limine*, before decree on merits, it should appear that there is reasonable probability of obtaining the general relief sought, and that the property, the subject of the suit, is in imminent danger.—*Ib.* 340.

Same; Other Remedies.—If any other remedy will afford adequate protection to the applicant, a receiver should not be appointed at any stage of the proceedings.—*Ib.* 340.

Same; Corporation; Directors and Officers Misappropriating Assets.—The fact that the directors and officers of a corporation are fraudulently misappropriating its assets will not alone constitute grounds for the appointment of a receiver. If they are solvent, complainant has an adequate remedy.—*Ib.* 340.

Same.—The remedy by accounting being adequate, the fact that the president of a corporation acquired a majority of its stock with corporate funds, in violation of his trust as such president, would not authorize the appointment of a receiver at the instance of a minority stockholder; for the corporation has an option to hold him to an accounting or to ratify his acts and claim the shares so purchased.—*Ib.* 340.

REDEMPTION.

§ 1. Under Foreclosure.

(a) Who Entitled.

Judgment Creditor; Redemption from Foreclosure under Mortgage.—Where a judgment creditor purchased at sale by Registrar (which sale was never confirmed) debtor's statutory right to redeem from foreclosure under mortgage, the purchase did not operate as a satisfaction of the decree, and did not destroy the judgment creditor's right to redeem.—*McGrough v. Deposit Bank.* 229.

Vendor and Purchaser; Right to Redeem by Purchaser after Sale.—The right to redeem after sale is a personal right, which cannot be transferred, except before sale; and the right of redemption as vendee, under Section 3505, Code 1896, extends only to those who have purchased the equity of redemption before a sale from which redemption is sought.—*Wallace v. Markstein.* 262.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments.—In order to maintain a bill to reform an instrument it must be plainly alleged and clearly proven that the parties thereto mutually intended that it should be expressed in terms different from what it contained, and that this failure or difference of expression was the result of mistake or fraud.—*Folmar v. Lehman-Durr Co.*, 472.

Reformation of Instruments; Validity.—The mortgage being void, in that its making was never confirmed by the court granting the right to execute it, it could not be made the basis of a bill to correct mistakes of description therein.—*Montgomery v. Perryman & Co.*, 207.

RELEASE.

Release; Contract Debt.—Release of a simple contract debt need not be in writing, but may be by parol.—*Hana Lumber Co. v. Hall.* 561.

RULES OF PRACTICE.

Supreme Court.

Rules 29 and 30, p. 1191-92.—*Hutchinson v. Palmer*, 517.

Circuit Court.

Rule 30.—*Harton v. Town of Avondale*, 458.

Rule 12.—*Eagle Iron Co. v. Baugh*, 613.

Chancery Court.

Rule 1.—*Ensley Development Co. v. Powell*, 300.

Rule 76.—*Sellers v. Farmer*, 446.

SALES.

See Contracts.

§ 1. Generally.

Sales; Purchasers from Buyer; Notice of Equity.—Where property was sold to a company in consideration of the organization of a corporation to carry on the lumber business, the purchaser of the property so sold to the company, who had knowledge of the equities of the seller in the property, is liable to the seller.

—*A. J. Cranor Co. v. Miller*, 268.

Sales; Remedy of Buyer from Life Tenant; Lien on Money Paid.

—Neither the purchaser from the life tenant, nor his assignee, has any lien upon the money paid for timber purchased of the life tenant, either in her hands or the hands of the children and heirs, that would authorize him to maintain a bill against the heirs to obtain a personal decree against them for a breach of covenant by the life tenant.—*C. W. Zimmerman Mfg. Co. v. Wilson*, 275.

Sales; Construction; Quantity; Ascertainment.—Under a contract by which the seller of coal agreed to deliver it by wagons to the buyer's furnaces, and the buyer agreed to pay a certain sum per bushel of 2748 cubic inches to be measured in the cab at the buyer's furnaces, and under this contract the buyer received the coal at its shed 75 or 100 yards from its furnaces, measuring it and receipting for it at such sheds; the place of delivery or receipt was the place of measurement to ascertain the quantity of coal, and not the furnace to which the coal was transported by means of the cabs into which it was loaded at the shed.—*Shelby Iron Co. v. Dupree*, 602.

§ 2. Contract of.

Vendor and Purchaser; Contract; Description of Land; Parol Evidence.—Where the contract for the sale of timber and lands described it as the "virgin growth, long leaf, yellow pine timber land and rights owned by party of first part." in a given township and range, etc., edge of C. River, such description is sufficient upon which to admit parol testimony of the definite location of the timber and lands so described.—*Howison v. Bartlett*, 408.

Sales; Contract; Breach; Action; Complaint.—The complaint having alleged defendant's refusal to deliver the cotton contracted for, and plaintiff's readiness and willingness to receive and pay for same, *ex vi termini*, these allegations import a demand for delivery and a refusal, and the complaint was not subject to demurrer for failing to allege a demand and refusal.—*McCleskey & Whitman v. Howell Cotton Co.*, 573.

Sales; Breach of Contract; Damages.—If there was no cotton market for the purchase of cotton similar to that offered and accepted, at the place of the offer and acceptance, the damages for the breach of the contract of sale was the difference in the price at which the cotton was offered and ac-

SALES—Continued.

cepted and the price plaintiffs (appellees) would have to pay for the same quality and quantity of cotton at the nearest available market where it could be obtained.—*Ib.* 573.

Sales; Breach of Contract; Damages; Evidence.—In an action for damages for the breach of a contract to purchase a certain quantity of wood, evidence of what the seller received for the wood which the buyer in the contract refused to receive was admissible to enable the jury and court to arrive at the damages.—*Eagle Iron Co. v. Baugh*, 613.

Sales; Contract; When Completed.—A traveling salesman, authorized to take orders subject to approval, sold goods to a buyer indicated by an order specifying the goods and the price to be paid and signed by the salesman only. Held, the order did not constitute a contract in the absence of an acceptance by the manufacturer.—*Gould v. Cates Chair Co.*, 629.

Same.—In April a traveling salesman, with authority to take orders subject to approval, sold a bill of goods to the buyer, which his principal approved and filed. During the following September the same salesman sold other goods to the same buyer, and made out a written order designating the goods and the price forwarded it to his principal, who held the order until November without indicating to the buyer whether it was accepted or rejected. Held, that the silence on the part of the principal, or manufacturer, did not constitute an acceptance of the order.—*Ib.* 629.

Same.—In November the buyer wrote to the manufacturer concerning the order, and the manufacturer replied declining the order at the price stated therein. Held, that the correspondence sufficiently showed a non-acceptance of the order.—*Ib.* 629.

§ 3. Offer and Acceptance.

Same; Offer and Acceptance.—An offer of sale of personal property, when made, is deemed to continue in force until refused or accepted, unless withdrawn before acceptance, and if this is relied on, it is a matter to be specially set up as a defense, and the complaint need not negative its withdrawal before acceptance.—*McCleskey & Whitman v. Howell Cotton Co.*, 573.

Same; Acceptance by Telegram.—Defendant (appellant) directed plaintiff's buyer and agent to offer plaintiff a certain amount of cotton at a certain price, which was done, and plaintiff (appellee) filed with the telegraph company an acceptance immediately and before being notified of a withdrawal of the offer; Held, to constitute a sufficient acceptance to form a contract of sale.—*Ib.* 573.

Same; Offer and Acceptance; New Terms.—The use of the words, "ship promptly" in the telegram of acceptance, meaning within a reasonable time, cannot be construed as adding any new or additional terms to the contract, but are mere shipping directions.—*Ib.* 573.

§ 4. Severability of Contract.

Sales; Severability of Contract.—The defendant ordered one car of sash, with the privilege of three cars at certain per cent off list price, specifications for the first car to be furnished within twenty days, and if others are taken, all to be furnished by April 1st after date of order; Held, such contract was severable, and that plaintiff was liable for failure to furnish other cars, although defendant did not furnish specifications for first car in time limit, for which defendant was liable.—*Rock Island S. & D. Works v. Moore-Handley Hdw. Co.*, 581.

SALES—Continued.

Same.—Where the buyer was to pay for goods in installments, and the goods were to be delivered in installments, such contract is severable, and in default of either party in one of the installments will not ordinarily entitle the other to abrogate the contract entirely.—*Ib.* 581.

§5. Right to Sell.

Sales; Right to Sell; Seller's Title.—Where one cut wood under a contract with a corporation, under which the wood did not become the property of the corporation until delivered at a certain place, a sale but such one to another before shipping the wood to that certain place, passed title to the wood to the purchaser.—*Smiley v. Hooper, et al.*, 646.

SEDUCTION.

Seduction; Evidence; Consent.—Where the act of intercourse was not shown to have been consummated between prosecutrix and the witness, evidence that the prosecutrix consented to have intercourse with the witness, was immaterial.—*Knight, N. v. State*, 93.

Same; Impeachment of Prosecutrix; Rebuttal.—Evidence as to the general character of the prosecutrix for virtue and chastity is admissible to rebut evidence offered to impeach her chastity.—*Ib.* 93.

Seduction; Jury Question.—Whether the act of intercourse was the result of force or of seduction is a question for the jury.—*Ib.* 93.

SHERIFFS AND CONSTABLES.

Sheriffs and Constables; Wrongful Attachments; Void Writ -- Defense.—A constable, under a void writ of attachment, levied upon certain property and delivered the same to plaintiff's landlord, who sold the property and applied the proceeds to an alleged indebtedness of plaintiff for rent. Held, even if plaintiff was indebted to his landlord in an amount exceeding the value of the cotton, such fact constituted no defense to an action of conversion against the constable.—*Smith v. Hilton*, 642.

Sheriffs and Constables; Attachment Levy; Trespass Ab Initio.—The fact that the sheriff, subsequent to the time he attached the goods, sold them at a place other than that advertised, did not render him a trespasser ab initio and thus liable to the mortgagee, if the mortgage was fraudulent as to creditors.—*Ryan, et al. v. Young*, 660.

Same; Levy of Attachment; Return of Writ; Sufficiency.—It appeared in evidence that during the term to which the attachment was returnable, the sheriff applied to the court for an order to sell the property levied on, on grounds stated therein, and that the application to sell was offered in evidence, reciting the fact that the attachment had been levied and return made thereon; and it further appeared that the court granted said application, that the sale was advertised and made under the order; The sheriff testified that after the sale under the order, he returned the writ into court with the money; it is apparent that the evidence referred not to the official return but the paper itself and it sufficiently appears that the sheriff made return of the writs to the term to which they were returnable.—*Ib.* 660.

SPECIFIC PERFORMANCE.

Specific Performance; Description; Sufficiency.—Where the description is such as to be capable of identification of the sub-

SPECIFIC PERFORMANCE—Continued.

ject matter of the contract by parol testimony, such contract will be specifically enforced.—*Howison v. Bartlett*, 408.
Same; Complete Contract; Defenses.—The option for sale of timber and lands contained the provision that, upon its ripening into a sale, the sale should be consummated on the same terms as those contained in a contract of sale of certain other lands, specifically referred to in the option. The said contract of sale provided a specific price per acre; that a survey should be made by a competent surveyor to be mutually agreed upon by both parties to the contract and the lands mapped and platted and the line sufficiently marked so as to distinguish the outside boundaries of the land. Held, that the provision of the contract that a surveyor be mutually agreed upon by the parties so that the lands might be surveyed and mapped and platted was not an essential element of the contract, but a mere incident, for the purpose of identifying the subject matter and determining the amount due under the contract; and a failure on the part of the parties to the contract to mutually agree upon a surveyor to do this work will not defeat a specific performance of the contract.—*Ib.* 408.

STATUTES CITED AND CONSIDERED.

GENERAL ACTS.

- 1886-87, p. 93. *Thomas v. Cowin*, 478.
 1888-89 p. 995. *Horton v. Town of Avondale*, 458.
 1890-91, p. 915. *Dix v. The State*, 70.
 1894-95, p. 139. *Horton v. Town of Avondale*, 458.
 1894-95, p. 636. *Gamble v. City of Montgomery*, 682.
 1894-95, p. 881. *Ensley Development Co. v. Powell*, 300.
 1896-97, p. 124. *Roland v. The State*, 149.
 1896-97, p. 802. *State v. Fuller*, 164.
 1898-99, p. 196. *State v. Fuller*, 164.
 1898-99, p. 836. *Bradford v. The State*, 120.
 1898-99, p. 236. *Williams v. The State*, 10.
 1900-01, p. 227. *Dix v. The State*, 70.
 1900-01, p. 2285. *Burrows v. The State*, 114.
 1903 p. 238. *Smith v. Hilton*, 642.
 1903 p. 337. *Ensley Development Co. v. Powell*, 300.
 1903 p. 388. *Dickinson v. Lraphagan*, 442.

TENDER.

Tender; Sufficiency of; Interest; Time and Computation.—The mortgagor went to a party who had previously been mortgagee's agent and paid a certain installment of interest; afterwards, the mortgagor came to the same person and told him that he desired to pay the mortgage debt and interest, but was informed that the mortgage had been turned over to mortgagee's administrator. The mortgagor and the former agent of the mortgagee agreed that the money should be paid to a third person to be turned over to the administrator on the surrender or delivery of the mortgage. Held, not such a payment or tender of the amount due as to discharge the debt or stop the running of interest.—*Hughes v. Clifton*, 531.

TENANCY IN COMMON.

Tenancy in Common; Services of Cotenant; Recovery for Services.—Where a minor makes a contract such as to render him a cotenant of the crop with the land owner, neither he nor his parents can recover of the land owner for services rendered by the minor towards making the crop, the same being ren-

TENANCY IN COMMON—*Continued.*

dered by such minor for his own benefit.—*Hendricks v. Clemmons*, 590.

TRESPASS.

§ 1. Criminal Responsibility.

Trespass; Offense; Evidence.—The fact that the prosecutor agreed with a third person on the day of the alleged trespass after warning that prosecutor was leaving the road open until it was determined whether or not he had the right to close it, was inadmissible as offering no defense or excuse for a trespass by defendant.—*Cross v. State*, 125.

Same.—The fact that prosecutor gave another permission to haul lumber over this road after he had warned defendant not to trespass on it, was immaterial as furnishing no excuse or defense to defendant's trespass.—*Ib.* 125.

TRIAL.

§ 1. Objection to Evidence.

Trial; Objection to Evidence; Sufficiency.—Where the interrogatories are not numbered in the record, and objection is made the answer of a witness "to the 9th and 10th district interrogatory, to each separately and to each separate statement contained in the answers," because the same are illegal, irrelevant and immaterial, this court cannot know to what the exception goes, and moreover the objectionable answers, or parts thereof, should have been specifically pointed out by the objection.—*McCleskey & Whitman v. Howell Cotton Co.*, 573.

§ 2. Instructions.

Trial; Affirmative Charge.—The making and breach of the contract being indisputably established by evidence without adverse inference, the plaintiff was entitled to nominal damages and to the affirmative charge, and it was harmless error to refuse defendants requested instructions.—*Ib.* 573.

Same; Instructions.—A charge that if the jury did not believe the evidence they must find for the defendant was bad and properly refused.—*Ib.* 573.

Trial; Instructions; Form and Requisites.—Where there was no controversy as to the renting or the amount to be paid and the only controversy was over the defense set up that defendant was entitled to compensation for the interruption of his business by tearing down and rebuilding a wall, a charge that if the jury does not believe the evidence they must find for the defendant, was confusing and misleading, and its giving error.—*McConnell v. Adair*, 599.

Trial; Instructions; Sufficiency of Evidence.—It being sufficient, in a civil case, if the evidence reasonably satisfies the jury of the truth of the allegations, a charge requiring that they be convinced with "reasonable certainty by credible testimony" is erroneous, as requiring a too high degree of proof.—*Smiley v. Hooper, et al.*, 646.

TROVER AND CASE.

See Action.

See Chattel Mortgages.

Trover and Case; Damages; Evidence.—The fact that three bales of cotton were converted by defendant, together with proof of the value of cotton per pound is sufficient to authorize a verdict for more than nominal damages, without proof of the weight of each bale.—*Baker v. Hutchinson*, 636.

Trover; Right of Action; Right of Possession.—In order to re-

TROVER AND CASE—*Continued.*

cover in an action of trover, the right to property, general or special, and possession, or immediate right of possession, must be in the plaintiff at the time of the conversion.—*So. Ry. Co. v. City of Atlanta*, 653.

Same; Complaint; Allegations; Sufficiency.—In an action for the conversion of water, an allegation that plaintiff put the water into a tank belonging to another railroad, pursuant to a contract with such road binding plaintiff to furnish water to such railroad for its exclusive use, and that defendant took the water and converted it to its own use, sufficiently shows ownership in plaintiff and plaintiff's possession at the time of the conversion.—*Ib.* 653.

Trover; Pleas; Defects; Election to Waive Tort; Sufficiency.—As an answer to a complaint in trover, a plea which alleges that the same plaintiff had previously instituted suit in assumpsit against this defendant, in which it treated defendant as a purchaser of the property alleged to have been converted, but which fails to allege a sale of the property by defendant before the institution of the assumpsit action, is fatally defective, as one may not recover for money had and received, based upon a conversion, unless there has been a sale of the property by the wrongdoer.—*Ib.* 653.

Same; Action; Pleading; Evidence.—It was permissible to introduce the summons and complaint in assumpsit in support of the plea of the institution of the suit in assumpsit before the bringing of the action of trover, as issue was joined on such plea.—*Ib.* 653.

Same; Right of Action.—Under a contract made by the city to furnish water to another railroad for its exclusive use, pursuant to which it furnished the water, which defendant took and converted to its own use, paying the other railroad therefor, the city had the right to maintain an action of trover against defendant for the water so converted.—*Ib.* 653.

Trover and Conversion; Pleading; Issues.—With the exception of a release, the plea of not guilty in trover puts in issue every matter pleadable in bar.—*Ryan, et al. v. Young*. 660.

Trover and Conversion; Measure of Damages.—The measure of damages in trover is the value of the property at the time of the conversion, with interest, but if the evidence showed a fluctuation in value between the time of conversion and the time of trial, the jury may adopt the highest value shown or any intermediate value at any time between the conversion and the trial.—*Ib.* 660.

Same; Mortgaged Property.—Where the plaintiff's title is based on a mortgage, the measure of damages, in trover, is the amount of the mortgage debt and interest, not to exceed the value of the property.—*Ib.* 660.

TRUSTS.

§ 1. Resulting Trust.

Trusts; Resulting Trusts; Bill to Establish.—In order to establish a resulting trust in land, it must be alleged with distinctness and precision the facts out of which the trust originated, and the averments must be shown by clear, full and convincing proof.—*Gilbreath, et al. v. Farrow*. 183.

Trusts; Resulting Trusts.—A bill to declare a trust in lands conveyed by deed absolute, which avers that no consideration was paid, but that the conveyance was intended only to vest the legal title in the grantee as trustee for one of the grantors; that subsequent to the deed one of the grantors therein paid

TRUSTS—Continued.

taxes on the land; that since grantor's death the grantee inquired if complainants would continue to pay taxes, and complainants furnished grantee money with which to pay taxes; that subsequent to the deed grantee advanced one of the grantors money at various times and looked to the property as security for the repayment of such sums, does not show a trust in lands resulting by implication of law.—*Jacoby, et al. v. Funkhouser*, 254.

§ 2. Express Trusts.

(a) How created in Land.

Trusts; Express Trusts in Lands; How Created; Necessity for Instruments in Writing.—A bill to declare an express trust in lands, which avers that the lands were conveyed by deed absolute, but contains no allegation that any instrument in writing, was executed, signed by the party creating or declaring the trust, or by his agent or attorney lawfully authorized there to in writing, as is required by Section 1041, Code 1896, is without equity; and the allegation that a letter was written by one of the grantors to the grantee, subsequent to the execution of the deed, declaring in effect, that such deed was executed for the purpose of securing any advances made by grantee to such grantor, is insufficient to bring the case within the terms of the statute; especially as it appears that such grantor had no title or interest in the land, but signed such deed as the husband of the other grantor, who was the real owner, for the purpose of joining therein with his wife.—*Jacoby v. Funkhouser*, 254.

Same; Parol Evidence.—An express trust in lands cannot be established by parol evidence, but only by written instrument, as is required by Section 1041, Code 1896.—*Ib.* 254.

§ 3. By Whom Enforced.

Trusts; Suit by Trustee; Nature of Title; Bill.—A bill filed by trustee to restrain the construction of a telephone line across land, which alleges that complainant was trustee for certain named persons, who are alleged to own the land, is fatally defective in not alleging facts to show that the trust is an active one, and not a mere naked trust, and that the complainant had the legal title.—*Roman v. Long Dis. Tel. & Tel. Co.*, 389.

VENDOR'S LIEN.

See Sales.

§ 1. Limitations.

Vendor's Lien; Enforcement; Statute of Limitations.—The statute of limitations of ten years has no application as a defense to an action to enforce a vendor's lien.—*Reynolds, et al. v. Lawrence*, 216.

§ 2. Parties to Action to Enforce.

Vendors and Purchasers; Parties.—All subpurchasers of parts of a tract of land are proper parties defendant to a bill to enforce a vendor's lien on the whole tract.

WASTE.

§ 1. Who Entitled to Stop.

Waste; Holder of Vendor's Lien Entitled to Have it Restrained.—A vendor with a lien for purchase money may maintain a suit to stop waste upon the land pending the payment of the purchase money.—*Reynolds, et al. v. Lawrence*, 216.

WAIVER.

See Action.

WILLS.

§ 1. Construction.

Wills; Construction; Lapsed Legacies; Effect.—Testatrix provided for two legacies of \$1,000 each, but the legatees died during life time of testatrix, the will provided further, that "all the balance of money now on hand (I mean gold and silver coin, and currency) and of which I die possessed, after the payment of the legacies mentioned herein, I bequeath ****; Held that the legacies lapsed and fell into general residuum of the state.—*Woodroof v. Hundley*, 287.

Wills; Construction; Parties in Interest.—A legatee under a will bequeathing to him the balance of money (meaning gold and silver coin and currency) of which testatrix dies possessed, after the payment of certain legacies, has no interest in the question of the validity or invalidity of a provision in a devise of real estate to trustees to use the income for a certain purpose as it in no wise affects his interests under the will.—*Ib.* 287.

Wills; Gifts of Personality; Testamentary Disposition.—The donor delivered to a trustee certain bonds, under a written instrument reserving to himself the interest arising from them during life, and directing the trustee, upon donor's death, to deliver the bonds to the person named in the writing; Held, an irrevocable disposition of the bonds, not testamentary in character, by which title passed out of donor, and not invalid as against the donor's wife.—*Robertson v. Robertson*, 311.

§ 2. Contest of.

Wills; Suit to Contest; Limitation.—The fact that some of the heirs at law of a testatrix were barred under the statute from proceeding in chancery to contest the will, did not affect the right of a minor who was not properly represented at the probate of the will in the probate court to contest the probate of the will—Sections 4298, 4299, Code 1896.—*Ellis v. Crawson*, 294.

Wills; Contest; Allegations of Grounds.—In a contest in chancery of a will under Sections 4298-4299, the party contesting is not confined to any one ground of contest, but all the grounds of contest mentioned in Section 4287 may be alleged.—*Ib.* 294.

Same; Sufficiency of Bill; Allegation of Fraud.—The allegations of grounds of contest should state facts and not conclusions and the bill alleging the execution of the will procured by fraud and misrepresentation without averring any facts constituting such fraud and misrepresentation is open to demurrer.—*Ib.* 294.

§ 3. Contract to Make.

Wills; Contract to Make Will; Enforcement.—A court of equity will enforce a valid agreement made by a person to dispose of his property by will in a particular way.—*Allen v. Bromberg*, 317.

Same; Remedies for Breach.—A valid contract for the disposition of property by will in a particular way, can only be enforced by fastening a trust on the property of the person making the agreement, on testator's death, in favor of the promisee, and enforcing it against the heirs and personal representatives of the testator, or those holding under them, charged with notice of the trust. The will is not set aside, but the executor heir or devisee is made trustee to perform the contract, hence

WILLS—Continued.

it is necessary that the will be first probated, else it cannot be recognized.—*Ib.* 317.

Same.—A person made a contract to execute a will containing certain provisions and naming certain persons as executors, which contract was performed. Thereafter this will was revoked by the execution of another will containing different provisions, but naming same executors. Held; this fact did not give the bill equity, as the contract could not be enforced by setting aside the last will and probating the former, as it was revoked by the execution of the later will, and can be revived only by the expressed intentions of the testator himself.—§§ 4264, 4266, Code 1896.—*Ib.* 317.

WITNESSES.

§ 1. Impeachment.

Witnesses; Impeachment; Predicate.—An impeaching question was properly disallowed which was foreign to the matter laid in the predicate.—*Williams v. State*, 10.

Witnesses; Bias.—When a witness for the defendant denied making threats against the deceased, and stated that he and deceased were on friendly terms, it was competent to show that witness had made threats against deceased, although made sometime before the killing as tending to show his feelings for deceased and his bias towards defendant.—*Hanners v. State*, 27.

Witnesses; Impeaching Testimony; Showing Ill-will on Part of Witness.—One of the defendant's witnesses having testified that he was a special friend of the deceased, it was proper to permit the solicitor to ask the witness if he had not been indicted in E. county for selling whiskey without license and requested the deceased to act as a witness for him, whereupon deceased replied that he would tell the truth to the disadvantage of witness, and that since that time witness had been angry with deceased.—*Glass v. State*, 50.

Same; Character for Truth and Veracity.—A witness cannot be asked as to his own character for truth and veracity.—*Ib.* 50.

Same; Credibility; Materiality of Evidence.—It being shown without dispute that a witness was in the employ of the railroad company near whose tracks the body was found, it was immaterial, as affecting his credibility on account of bias or interest, whether he voluntarily ascertained the facts as to the appearance of the body about which he testified, or whether he ascertained them as part of his duty as a railroad employe to get up evidence where a body was found on or near the track.—*Parham v. State*, 57.

Witnesses; Credibility; Evidence.—The fact that a witness who testified to threats made by defendant against deceased, was a member of the coroner's jury which investigated the case, and said nothing about his knowledge of such threats while on the jury, although the jury was charged to look up all the evidence bearing on the case, was not additional circumstance of a discrediting nature to the evidence allowed to be introduced that he knew of such threats while a member of such jury and said nothing about it, was immaterial and properly disallowed.—*Ib.* 57.

Witnesses; Recalling Witnesses for Impeachment.—It is within the discretion of the trial court, and not reversible on appeal, to allow the solicitor to recall defendant's witnesses for the purpose of laying a predicate to impeach them; and if per-

WITNESSES—Continued.

mitted by the court to do so, this act does not make such witnesses state witnesses.—*Hammond v. State*, 79.

Witnesses; Bias.—It was competent, on cross examination of defendant, to show that he had sworn out a warrant for prosecutor's arrest, as bearing upon defendant's bias.—*Cross v. State*, 125.

§ 2. Competency.

Witnesses; Competency; Conviction of Felony; Credibility.—A conviction for a felony, whether statutory or otherwise, may be shown for the purpose of affecting the credibility of a witness under § 1795, Code 1896, and this may be shown by oral proof without the production of the record.—*Fuller v. State*, 35.

Witness; Children; Competency.—Although a child twelve years of age testified that she did not understand the question, whether she knew the nature of a judicial oath, yet, by other answers showed sufficient knowledge of the obligation of an oath, she was properly allowed to testify.—*Gordon v. State*, 42.

§ 3. Examination; Scope.

Same; Scope of Redirect Examination.—A witness for the state was asked, on cross examination, if he had ever had any trouble with defendant, and answered, "yes, in this way." On redirect examination the state had the right to show the nature of the difficulty, without going into the details.—*Glass v. State*, 50.

Witnesses; Examination; General Questions.—A question, referring to a time a week before the alleged homicide, "what did defendant say to deceased when he left her that morning," being so general that irrelevant evidence would be responsive to it was objectionable.—*Parham v. State*, 57.

Witnesses; Cross Examination; Knowledge of Witness.—Witnesses having testified that they did not think the place where the game was played could be seen from a certain public road, it was proper for the solicitor on cross examination, to ask the witness if they could say that the playing at the place could not be seen from any point along the public road.—*Bradford v. State*, 118.

Witnesses; Cross Examination; Discretion of Trial Court.—It was largely within the discretion of the trial court as to what latitude it would allow upon cross examination, to test the knowledge, accuracy of memory, and truthfulness, and as controverting the facts deposed to by a witness, who on his direct examination, testified that he had purchased the wood, alleged to have been converted, for the plaintiff as his agent.—*Smiley v. Hooper, et al.*, 646.

§ 4. Transactions with Deceased Persons.

Witnesses; Transactions with Deceased Person.—Under Section 1794, Code 1896, the donee is incompetent to testify as to what occurred between himself and the donor, who had died, concerning the making of the gift.—*Thomas v. Tilley*, 189.

Witnesses; Competency; Transaction with Decedent.—In an action against an administrator seeking to recover against such for alleged services rendered decedent in life, plaintiff was incompetent under § 1794, Code 1896, to give testimony concerning transactions with or services rendered to decedent.—*Patterson v. Carter*, 522.

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